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No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

PATRICIA CAMPBELL HEARST,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the personal involvement of trial counsel in a conflict of interest resulting from his conduct in contracting during trial to publish a book about petitioner and her trial, and, from his acquisition from his client of a Covenant not to compete, renders counsel "insufficient" pursuant to the standards articulated by this Court in *Cuyler v. Sullivan* ..... U.S. ....., 48 U.S.L.W. 4517 (1980).

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I

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A. This Court's holding in Cuyler v. Sullivan is premised on a recognition multiple defendants for valid reasons can intelligently and freely choose a common lawyer. There can be no valid reason for having a lawyer with a personal financial interest in how he exercises his judgment during trial proceedings 10

B. Based on this Court's reasoning in Cuyler, the fact of multiple representation requires inquiry to determine whether there is "adverse affect"; and the fact of the lawyer's personal financial involvement in his decision making process during trial proceedings establishes "adverse affect" and requires the conviction to be vacated 13

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II

At least, this Court should grant a writ to resolve any ambiguity in the law promulgated by Cuyler v. Sullivan, supra, as applied to conflicts of interest resulting from the conduct of counsel and his personal involvement, in entering into contracts and covenants in violation of A.B.A. C.P.R. disciplinary rules 15

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Petitioner, Patricia Campbell Hearst, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on October 17, 1980 (C.A. No. 78-3612; D.C. No. CR-74-364).

OPINION BELOW

The opinion of United States Court of Appeals for the Ninth Circuit (C.A. 78-3612) is entitled *United States v. Hearst* and is reported at ..... F.2d ..... A true and correct copy of the original opinion of the Court of Appeals is appended hereto as "Appendix A".

JURISDICTION

The judgment and opinion of the Court of Appeals for the Ninth Circuit was entered on October 17, 1980. A timely petition for rehearing and suggestion for appropriateness of rehearing *en banc* was filed, and denied by the Court of Appeals on January 15, 1981 and on January 28, 1981, pursuant to an "Amended Order", and the suggestion of appropriateness of rehearing *en banc* was rejected on that date. Petitioner's motion for stay of mandate was granted by the United States Court of Appeals on January 28, 1981. No order has been sought granting an extension of time within which to petition for Certiorari. Jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISION INVOLVED AND AT ISSUE

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and the district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and be informed of the nature and cause of the accusations; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

RULES AND REGULATIONS

American Bar Association Code of Professional Responsibility: Canons 4, 5, 9.

Ethical Considerations: 4-1, 4-4, 4-5, 5-2, 5-4, 5-21, 9-1, 9-2 (Appendix C, A-64).

Disciplinary Rules: 4-101(B)(1); 4-101(B)(3); 5-101(A) (Appendix C, A-65).

STATEMENT OF THE CASE

On June 6, 1974, petitioner Patricia Campbell Hearst was indicted by a Grand Jury in the Northern District of California on two counts: a violation of Title 18, U.S.C. § 2113(a)(d), Bank Robbery (Count I), and for a violation of Title 18, U.S.C. § 924(c)(1), Use of a Firearm to Commit a Felony (Count II). On September 18, 1974, petitioner was arrested and arraigned in the United States District Court for the District of California. Thereafter, on January 26, 1976, a jury trial of defendant commenced. On March 20, 1976, the jury returned a verdict of guilty on both Counts of the indictment. On April 12, 1976, petitioner was ordered by the District Court to undergo a ninety day period of observation pursuant to the provisions of 18 U.S.C. § 4208(b), which was extended for an additional ninety days on June 7, 1976.

On September 24, 1976, petitioner was sentenced to seven years on Count I of the indictment, and two years on Count II thereof to be served concurrently with Count I. After a timely notice of appeal, a direct appeal was taken and decided in *United States v. Hearst* 563 F.2d 1331 (9th Cir. 1977, cert. den., 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.

2d 90, (1978)). On May 15, 1978, petitioner surrendered pursuant to the mandate of the United States District Court to the Federal Correctional Institution at Pleasanton, California.[1]

On August 2, 1978, with new counsel, appellant filed with the United States District Court for the Northern District of California a motion pursuant to 28 U.S.C. § 2255 for an order vacating her sentence. The District Court denied the motion, *U.S. v. Hearst*, 466 F.Supp. 1068. A copy of the decision of the District Court therein appears as Appendix B to this petition. On November 13, 1978, defendant filed a timely notice of appeal (C.R. 568) and thereafter filed her brief with the United States Court of Appeals. Therein, petitioner noted that the District Court had assumed as a fact the existence of certain prohibited literary rights contracts with third person publishers, and, with petitioner, and, that the District Court stated that pressures resulting from financial interests outside the representation of petitioner may render suspect the adequacy of

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[1]After the District Court's denial of her 2255 motion, defendant was the recipient of an Executive Grant of Clemency and thereby her sentence was commuted by President Jimmy Carter and she was released from the Federal Correctional Institution at Pleasanton, California, on February 1, 1979. Included in the "White House Press Announcement", of petitioner's commutation, January 29, 1979, was an excerpt from the Office of Public Information, Dept. of Justice Memorandum No. 202-622-2028, wherein the Justice Department observed:

> "It is the consensus of all of those most familiar with this case that but for the extraordinary criminal and degrading experiences that the petitioner suffered as a victim of the SLA she would not have become a participant in the criminal acts for which she stands convicted and sentenced and would not have suffered the punishment and other consequences she has endured."

the lawyer's performance. *U.S. v. Hearst*, 466 F.Supp. 1068, 1083 (1978). The District Court noted further that the acquisition by former defense counsel prior to the conclusion of his representation of literary or dramatic rights to petitioner's story, "is a practice which deserves judicial condemnation" (*Id* at page 1083), and noted further that the A.B.A. Code of Professional Responsibility renders such conduct the object of disciplinary proceedings and properly so, the District Court observed, because of the possibility "that divergent financial interests will diminish the rigor of the representation." *Id* at page 1083. Petitioner argued in her brief to the United States Court of Appeals that given the conclusions of the District Court, prejudice to her had been established and her conviction must be set aside. This was so, she argued, because prejudice would be presumed under such circumstances, or, if she had the burden of showing prejudice, the assumptions and observations of the District Court demonstrated she had met her burden. Excerpts from Petitioner's Brief is appended hereto as "Appendix D".[2] Subsequent to oral argument, this Court decided *Cuyler v. Sullivan*, ... U.S. ....., 48 U.S.L.W. 4517 (1980). On August 7, 1980, the United States Court of Appeals (9th Cir.) issued its Order requesting the parties hereto to file simultaneous memoranda on the effects thereof on the then pending appeal. On October 17, 1980, United States Court of Appeals filed its opinion. (Appendix A).

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[2]"Appendix D" is exclusively to demonstrate that the issue was raised on appeal with the United States Court of Appeals. The brief was filed prior to this Court's decision in *Cuyler v. Sullivan*, ... U.S. ..., 48 U.S.L.W. 4517 (1980) holding that it was not necessary to show "prejudice" after a conflict of interest was established.

STATEMENT OF FACTS

The following are facts as found by the United States Court of Appeals. Petitioner's trial began in February, 1976, and ended March 20, 1976, when she was convicted (Opn. p. 2, l. 11-13). After her direct appeals failed petitioner filed her 2255 motion. F. Lee Bailey, responding thereto, admitted he had received several offers to publish a book concerning the Hearst trial, and, a contract was signed during petitioner's trial with G. P. Putnam, (Publisher), which was made contingent upon Ms. Hearst agreeing not to write about her experiences for 18 months subsequent to the publication. (Opn. p. 2, 1; pp. 15-19).

Two days after her conviction, on March 22, (1976) J. Albert Johnson, Bailey's associate, brought her a Covenant, which petitioner signed in the form of a letter to Putnam/Berkeley Publishing Corporation, New York, New York, which stated:

> "Gentlemen:
> "I understand that F. Lee Bailey is writing a book about my trial and life story as it pertains to the trial for which he *will contract* with you for publication in the U.S. and Canada.
> "As an inducement for you to publish this book, I hereby agree not to publish any account of any experiences in book, magazine, or any other form prior to 18 months from your initial (hardcover) publication of Mr. Bailey's book, and I further agree to cooperate fully and exclusively with Mr. Bailey in his preparation and writing of the book in any manner he requires.
>
> "Very truly yours,
> "Patricia C. Hearst"
> "Patricia Campbell Hearst."

(Opn. p. 2-3).

(This language in the March 22, 1976 Covenant is consistent with the Declaration filed by petitioner in the U.S. District Court in aid of her original 2255 motion wherein she swears she knew nothing of the contract F. Lee Bailey executed during her trial with the publisher until Aug. 9, 1978, 2½ years after her trial (CR Dkt # 455).)

Ms. Hearst further declared by affidavit that before trial, Bailey's associate, J. Albert Johnson, told her Bailey would write a book about her, and that the book rights were part of the fee arrangement her parents had made, that she had to agree to the arrangement but was not to discuss it. Randolph Hearst, appellant's father, declared, among other things, that he did not consider book rights to be part of the fee arrangement for the trial, and that he did not know that Bailey had negotiated or contracted during the trial to write a book. (Opn. p. 3).

Petitioner charged that her then counsel failed to seek a continuance or a change of venue because it was consistent with his book publishing interest to try the case as soon as possible in the area of the most intense interest. (Opn. p. 5, l. 2-9), and that Bailey's decision to put petitioner on the witness stand was influenced by his interest in making a public record unconstrained by the attorney/client confidentiality rules so her story could be published. (Opn. p. 3, l. 10-14). The latter decision resulted in the necessity of petitioner invoking the Fifth Amendment in the presence of the jury 42 times. (Opn. p. 5, l. 13-15).

The Court of Appeals, alluding to the admissions of F. Lee Bailey, and covenants in the record addressed to the publisher, signed by the petitioner, at the request of F. Lee Bailey, held:

> "Bailey's potential conflict of interest is virtually admitted and Hearst has alleged an actual conflict and adverse effect in sufficient and not implausible detail". (Opn. p. 8, l. 31, p. 9, l. 1-3).

The Court of Appeals stated that Bailey's decision to enter into a book contract, was "most unfortunate" in light of A.B.A. C.P.R. Disciplinary Rules 5-101(A), and that the March 22 covenant signed by petitioner constituted an "interest in publication rights" which apparently caused Bailey to be in violation of A.B.A. C.P.R. Disciplinary Rule 5-104(B). (Opn. p. 14-15). The Court held that if fraud allegations were proven, there may have been a violation of the A.B.A. C.P.R. Disciplinary Rule 1-102(A)(4), and, of the California Rules of Professional Conduct, 5-101. So seriously did the Court of Appeals view the admitted, proven and alleged conduct of trial counsel that it suggested disciplinary proceedings on remand to the District Court (Opn. p. 16) and stated it would await the findings of the District Court before determining whether the United States Court of Appeals would issue its own "order to show cause" why Bailey should not be disciplined. (Opn. FN 7).

REASONS FOR GRANTING THE WRIT

I

THE DECISION OF THE U.S. COURT OF APPEALS HEREIN CONFLICTS WITH THIS COURT'S DECISION IN CUYLER v. SULLIVAN, ... U.S. ..... 1980. THE PROHIBITED CONTRACT AND COVENANTS DEMONSTRATE AN ACTUAL, NOT A POTENTIAL CONFLICT OF INTEREST

This Court in applying the principles of *Glasser v. U.S.*, 315 U.S. 60; and, *Holloway v. Arkansas*, 435 U.S. 475, 98

S.Ct. 1173, 55 L.Ed.2d 426 (1978) addressed the effect of multiple representation and the potential conflict of interest resulting therefrom on the right to effective counsel guaranteed pursuant to the U.S. Constitution, amendment six.[3]

This Court held "In order to establish a violation of the Sixth Amendment a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Cuyler v. Sullivan, supra,* at 1718. Once a conflict of interest thusly defined is demonstrated, this Court determined, the defendant need not show prejudice in order to obtain relief. *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978).

This Court's view of the application of *Holloway v. Arkansas* and *Glasser v. U.S.*, 315 U.S. 60, 62 S.Ct. 457, 87 L.Ed.2d 680, to multiple representation cases is stated thusly:

> "*Holloway* reaffirmed that multiple representation does not violate the Sixth Amendment unless it gives rise to a conflict of interest . . . Since a possible conflict of interest inheres in every instance of multiple representation, a defendant who objects to multiple representation must have the opportunity to show that potential conflicts impermissibly imperil his right to a fair trial. But unless the trial court fails to afford such

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[3]In so doing this Court laid to rest once and for all any claim that defendants who obtain their own lawyers are entitled to less protection under the Sixth Amendment guarantee to counsel than defendants for whom they are appointed. This Court stated: "The vital guarantee of the Sixth Amendment would stand for little if the often uninformed decision to retain a particular lawyer could reduce or forfeit the defendant's entitlement to constitutional protection." *Cuyler v. Sullivan, supra,* at 1716.

opportunity, a reviewing court cannot presume that the possibility for conflict had resulted in ineffective assistance of counsel. *Such a presumption would preclude multiple representation even in cases where "'a common defense . . . gives strength against a common attack' ". Id* at p. 482, 483, 98 S.Ct. at 1178, quoting *Glasser v. U.S.*, 315 U.S. 60, 92, 62 S.Ct. 457, 475, 86 L.Ed. 680 (1942) (Frankfurter J., dissenting)" (Emphasis added.) *Cuyler v. Sullivan*, 100 S.Ct. 1078 at 1718.

A. This Court's holding in Cuyler v. Sullivan is premised on a recognition multiple defendants for valid reasons can intelligently and freely choose a common lawyer. There can be no valid reason for having a lawyer with a personal financial interest in how he exercises his judgment during trial proceedings.

The basis for the distinction between the rule sought herein, and, in this Court's application of *Cuyler v. Sullivan, supra* at 1718, to multiple representation cases, is immediately apparent from the quoted language, *Id* at 1718. The admitted book contract executed during trial, and the proven Covenant Bailey caused to be signed by petitioner a mere two days after the guilty verdict in petitioner's trial while counsel was still representing petitioner, and his financial interest in his decision making process, (Opn. p. 15, l. 1-8) could never be defined by this Court as falling within some acceptable strategy or potential benefit to a defendant who does not object.

It is clear from *Cuyler* that a defendant establishes an actual conflict of interest once it is determined that the conduct of the attorney could not, as in "a common defense . . ." situation ever "give strength . . ." to or otherwise benefit his client. Substance is given this view

by the Supreme Court of Pennsylvania in *Commonwealth v. Fontana*, 415 Atl2d 4, decided April 30, 1980, after *U.S. ex rel. Sullivan v. Cuyler*, 593 F.2d 512, (3rd Cir. 1979), but, prior to this Court's decision in *Cuyler v. Sullivan, supra.* Therein, the Pennsylvania Supreme Court determined that trial counsel was in fact a potential witness in the case he tried for his client, and, that he apparently violated Pennsylvania canons of ethics thereby. The court held:

> "Surely, the protections afforded a defendant by the constitutional right to counsel in the dual representation cases, apply with *greater force* where the conflict arises because of counsel's *personal involvement*". (Emphasis added.) *Commonwealth v. Fontana, supra,* 8.[4]

In his concurring and dissenting opinion in *Cuyler v. Sullivan, supra,* Mr. Justice Brennan would have applied

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[4]The United States Court of Appeals (Appendix A) in fact articulates the reason for the standard in conflict cases resulting from the personal involvement of counsel in a book contract conflict:

> "This recognition becomes even more explicit in the Rule 1.9(d) of the Discussion Draft of the A.B.A. Model Rules of Professional Conduct, reprinted in 48 U.S.L.W. 32 at 8 (Feb. 19, 1980): 'Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary rights to a matter arising from the representation.' The comment to that proposed rule reads in part:
>
> "'An agreement by which a lawyer acquires literary rights concerning the subject matter of the representation involves incompatible standards for the lawyer's performance, *one being effectiveness in representing the client, and the other being performance that has literary value. . . .*'" Opn. p. 13, l. 31, 32, note 6. (Appendix A)
>
> "the proposed rule, if in effect at the time would explicitly have prohibited Bailey's Book Contract." *U.S. v. Hearst*, Appendix A, fn.6.

the *Pennsylvania* rule in *Fontana* even to the multiple representation case in *Cuyler*. He states: "Defendants usually have the right to share a lawyer if they so choose, (but) that choice must always be knowing and intelligent." *Id* at 17-19. Mr. Justice Brennan would have determined that a defendant is "entitled to a presumption that his representation in fact suffered" in such cases. *Id* at 1721.

The reason supporting Mr. Justice Brennan's "knowing and intelligent" rule is illustrated by the court in *Grey v. Estelle*, 616 F.2d 801 (5th Cir., 1980) holding that *if the record is silent on whether the defendant who is aware of a conflict, understood the dangers the conflict posed for his defense, the conviction must be vacated. Id* at 804.

Even more clear is Mr. Justice Marshall's articulation of what we believe to be the rule in book contract cases personally obligating and involving the attorney. In his concurring and dissenting opinion, Mr. Justice Marshall would have affirmed the judgment of the Court of Appeals reversing the convictions of petitioners therein, and states the evil in requiring some overt demonstration of "adverse effect" even in multiple representation cases, to be:

> ". . . It would be difficult to judge intelligently the *impact* of a conflict on the attorney's representation of a client and to assess the impact of a conflict of interest on the attorney's options, tactics, and decisions . . . would be virtually impossible.
>
> "Accordingly, in *Holloway* we emphatically rejected the suggestion that a defendant must show prejudice in order to be entitled to relief. For the same reasons, it would usually be futile to attempt to determine how counsel's conduct would have been different if he

had not been under conflicting duties." *Cuyler v. Sullivan, supra,* at 1723.

Mr. Justice Marshall pointed out that the testimony of the trial lawyer therein would have been sufficient to make out a case of ineffective assistance in *Cuyler v. Sullivan,* supra. But:

> "In the usual case, however, we might expect the attorney to be unwilling to give such supportive testimony, thereby impugning his profesional efforts. Moreover, in many cases, the effects of the conflict on the attorney's performance will not be discernible from the record. It is plain to me therefore that in some instances the defendant will be able to show there was an actual, relevant conflict, but be unable to show that it changed his attorney's conduct." *Id* at 1723.

Mr. Justice Marshall continued, observing that the majority could be holding therein that the adequacy of the representation *is* adversely affected if the attorney had to make decisions under the constraint of inconsistent duties, and "if that is the case, the court's view and mine may not be so far apart after all". *Id* at 1723.

B. Based on this Court's reasoning in Cuyler, the fact of multiple representation requires inquiry to determine whether there is "adverse affect"; and the fact of the lawyer's personal financial involvement in his decision making process during trial proceedings establishes "adverse affect" and requires the conviction to be vacated.

This Court in *Cuyler v. Sullivan, supra,* held that *absent an objection* the trial court need not initiate an inquiry

from the *fact* of multiple representation inasmuch as it recognized the possibility of a "common defense . . . (giving strength) against a common attack" best known to the lawyers and the client. This court in *Cuyler v. Sullivan* however, has recognized as the "on-going trend" and, as a "desirable practice", *Cuyler v. Sullivan,* 100 S.Ct. 1708, 1717 n.10, the requirement that trial courts exercise supervisory power to inquire into apparent conflict of interest situations, and, when necessary, to remove counsel rendered "insufficient" thereby.[5]

This court in *Cuyler* strongly implied that the trial court would nonetheless be required Sue Sponte to initiate an inquiry if it knew or reasonably should have known of the existence of a conflict of interest, as defined, from the nature of the multiple representation. Had the trial court known of the book contracts, and had such an inquiry been initiated herein, and had the facts found by the Ninth United States Court of Appeals come to light, counsel would have been rendered "insufficient" thereby as a matter of law and disqualified pursuant to the standards promulgated in *Cuyler v. Sullivan,* 100 S.Ct. 1708 (1980). After trial the considerations for disqualification remain the same, and have been articulated by the U.S. District Court (Appendix B, *U.S. v. Hearst,* 466 F.Supp. 1068 at 1083) and by the U.S. Court of Appeals. (Opn. pp. 8-16, and n.6.)

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[5]The California District Court of Appeal, *sua sponte,* disqualified two lawyers *prior to trial,* when it became aware that counsel had caused their client to sign a book contract wherein, *after complete disclosure* of every potential adverse effect resulting therefrom, the client assigned book rights and waived the attorney client privilege to satisfy the fee arrangement between them. Even

II

AT LEAST, THIS COURT SHOULD GRANT A WRIT TO RESOLVE ANY AMBIGUITY IN THE LAW PROMULGATED BY CUYLER v. SULLIVAN SUPRA, AS APPLIED TO CONFLICTS OF INTEREST RESULTING FROM THE CONDUCT OF COUNSEL AND HIS PERSONAL INVOLVEMENT, IN ENTERING INTO CONTRACTS AND COVENANTS IN VIOLATION OF A.B.A. C.P.R. DISCIPLINARY RULES

The constitutional standard should be clearly articulated by this Court to preserve public confidence in the integrity of our system of justice.[6] Certainly, it is not possible to reduce the issue before this Court to the simple denominator of looking exclusively to the rights of petitioner. The consequences of actual or apparent attorney misconduct violating the rules of this Court, or, the A.B.A. Disciplinary

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though the client said "Yes", the court said "No" on U.S. constitutional grounds (6th Amend.) and disqualified the lawyers from acting further in the case. *Maxwell v. Superior Court*, 101 CA3d 341, 16 Cal.Rptr. 849, 854-56, 861 (1980). A hearing before the California Supreme Court has been granted; there is no decision to date from the California Supreme Court.

[6]All state and federal courts speaking directly to the issue created by the attorney's "personal involvement" in a conflict of interest show *extreme concern* over the implications thereof on the integrity of our system of justice and the possible erosion of public confidence therein. This certainly includes the trial court and court of appeals herein (Appendixes A and B). See also the possible involvement of *A.B.A. C.P.R. Canon 4:* "A lawyer should preserve the confidences and secrets of a client"; (EC 4-1) (D.R. 4-10). *Canon 5:* "A lawyer should exercise independent professional judgment on behalf of a client", (EC 5-1; 5-2; 5-3 & 5-4.) dealing with the lawyer's acquisition from the client of publication rights, and EC 5-21, in regard to "desires of third persons" impairing the lawyer's judgment (i.e., a publisher?); DR 5-101(A), in respect to accepting other employment where professional judgment may

Rules, or, the standards of the United States Court of Appeals herein, recognized from the authorities stated in its opinion (Appendix A, p. 14, l. 1-11) should be fully articulated by this Court to clear up any potential ambiguity based on diverse interpretations of *Cuyler v. Sullivan, supra.*

If not previously decided by this Court in *Cuyler v. Sullivan, supra,* left unresolved by the sundry interpretations of *Glasser v. U.S.* (1942) 315 U.S. 60, together with *Holloway v. Arkansas,* 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978), is the question of the effect of a prohibited book contract giving rise to a "personal involvement" conflict of interest. Precisely, the questions left unresolved would then be: (a) where it appears from the record below that the conduct of counsel, in failing to

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be impaired); and, *Canon* 9: "A lawyer should avoid even the appearance of professional impropriety" (D.R. 9-101); the latter would be tested by the Court of Appeals herein recognizing the "appearance" of a violation of A.B.A. C.P.R. Disciplinary Rules 1-102(A)(4) and California Rules of Professional Conduct 5-101, Appendix A, P. 16-18. See also *Commonwealth v. Fontana,* (1980) 415 A.2d 4, (PA 5th Cir); *Grey v. Estelle,* 616 F.2d 801 (5th Cir. TX 1980); *People v. Corona,* 80 CA3d 684; 145 CR 894 (hearing denied) *Maxwell v. Superior Court,* 101 CA3d 341, 161 CR 849 (1980): ". . . A conflict of interest which arises from the fee-interest potential of the retainer agreement is so inherently conductive to divided loyalties as to amount to a denial of the right of effective representation as a matter of law. See *Glasser v. U.S.* (1942) 315 U.S. 60; *Costello v. Estelle* (5th Cir. 1974) 504 F.2d 1243."

This state appellate decision (Corona) has special significance inasmuch as support for the decision is drawn from the decision of this Court in *Glasser v. U.S. supra.* The court in *Maxwell v. Superior Court, supra,* also held "under the circumstances presented in this case, at bench, the preservation of the judicial integrity should be given full recognition. . . ." Id. at page 345.

pursue remedies to combat the effects of adverse publicity and in making a decision to have petitioner testify on the merits of her case, was consistent with (if not motivated by) his personal financial interest resulting from book contracts, does the existence of a conflict of interest (as defined) depend on Counsels "explanations" of his decision-making process? (b) can there be "sufficient counsel", who at the same time violates standards of conduct designed to avoid the risks of which we complain here?

III

THE CALIFORNIA SUPREME COURT HAS DECIDED THIS QUESTION IN A WAY THAT CONFLICTS WITH THE DECISION OF THE UNITED STATES COURT OF APPEALS HEREIN. THIS COURT SHOULD RESOLVE THE AMBIGUITY RESULTING THEREFROM

The nexus of the conflict seems to have been created by different interpretations of *Glasser v. U.S.*, 315 U.S. 60, 75-76, and, *Holloway v. Arkansas*, 435 U.S. 475, 98 S.Ct. 1173. In *Holloway*, the court determined that the Sixth Amendment right to effective assistance of counsel encompassed the right to representation by an attorney who does not owe conflicting duties to other defendants. This Court in *Holloway* noted that this Court in *Glasser* guaranteed effective counsel to accused persons. The California District Court of Appeal in *People v. Corona* 80 CA3d 684, 145 CR 984 (hearing denied) stated:

> ". . . B. We believe appellants alternative argument predicated on conflict of interest is equally well taken

and furnishes an additional ground for reversal.

". . .

". . . One, it is indisputable that by entering into the literary rights contract counsel created a situation which prevented him from devoting the requisite undivided loyalty and service to his client. *From that moment on* trial counsel was devoted to two masters with conflicting interests—he was forced to choose between his own pocketbook and the best interests of his client, the accused . . . such conduct constituted not only an outrageous abrogation of the standards which the legal profession has set for itself and upon which clients have a right to rely, but also rendered the trial a farce and mockery, calling for the reversal of the conviction and requiring a new trial." *People v. Corona,* 80 CA3d 684 at 727.

The holding in *Corona* was authority for the later decision by the California District Court of Appeal in *Maxwell v. Superior Court of Los Angeles*, 101 CA3d 736[7] wherein the action of the trial court disqualifying counsel was upheld by the California District Court of Appeal:

". . . a conflict of interest which arises from the fee interest potential of the retainer agreement here is so inherently conducive to divided loyalties as to amount to a denial of the right to effective representation as a matter of law. (See *Glasser v. U.S.* (1942) 315 U.S. 60) The conflict of interest involved is glaring and obtrusive. The situation is thus not unlike that presented in *Corona,* in which the Court remarked that 'it is indisputable that by entering into a literary

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[7]It is important to note that the clients in *Corona* and *Maxwell* knew of and approved of the conduct of their counsel, and, clearly consented to the contract.

> rights contract, counsel created a situation which prevented him from devoting the requisite undivided loyalty and service to his client. From that moment on, the trial counsel was devoted to two masters with conflicting interests. He was forced to choose between his own pocketbook and the best interests of his client, the accused. *People v. Corona,* 80 CA3d 684, 720.' "

Also see *People v. Superior Court (Corona)* 110 CA3d 200, Sept. 15, 1980, wherein the court, in weighing the effect of counsel's book contract on pretrial suppression procedures, observed:

> "The *nature* of counsel's conflict of interest was such that his economic interests were likely to be served by proceeding to trial with all the lurid evidence that the prosecutor could produce, rather than attempt to exclude legal inadmissible evidence on the basis of 'technical assertions of constitutional right." *Id* 205.

It is noteworthy that such conclusions in the California cases did not have support from testimony of Corona's then counsel in his explanations of his "strategical" conduct. *People v. Superior Court (Corona) supra,* page 208. Indeed, the strong implication of the California cases is that where counsel is personally involved in the conflict, declarations of counsel as to "strategy" are to be simply disregarded, inasmuch as:

> "We might expect the attorney to be unwilling to give (such) supportive testimony thereby impugning his professional efforts." (Concurring and dissenting opinion of Mr. Justice Marshall). *Cuyler v. Sullivan,* 100 S.Ct. 1708, 1723.

We believe that the holding of the United States Court of Appeals herein conflicts with that of the California Supreme Court after the efforts of the respective judicial bodies to determine the effect on petitioner's right to counsel of a conflict of interest resulting from the personal financial involvement of counsel resulting from his Book Contracts and Covenants.

CONCLUSION

We submit that the issue presented herein goes to the heart of our judicial system. The potential or apparent violations of several A.B.A. Disciplinary Rules and Canons of Professional Conduct as the result of the prohibited contract and covenant certainly could never be other than an actual conflict of interest as defined by this Court in *Cuyler v. Sullivan, supra.* There can be no "common defense . . . against a common attack" or any other potential benefit to petitioner from such conduct. Petitioner did not consent; but had she, her judgment or conviction should have been vacated in any event. Certainly it cannot be said that trial court questioned petitioner as to her recognition of and assumption of any danger or risk (the trial court did not know of the contract). The "adverse effect" is inherent from counsel's personal financial involvement in his decision-making process. The stated violations of A.B.A. Canons cannot be invoked to initiate disciplinary proceedings as suggested by the United States Court of Appeals, but overlooked insofar as such conduct affects petitioner's right to the effective assistance of counsel.

For the reasons set forth herein, it is respectfully requested that this Court grant the Writ as prayed.

Dated: February 17, 1981

Respectfully submitted,
LAW OFFICE OF
GEORGE C. MARTINEZ

By GEORGE C. MARTINEZ
Attorney for Petitioner
Patricia Campbell Hearst

(Appendices follow)

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 78-3612

DC No. CR-74-364

United States of America,
Plaintiff-Appellee,

v.

Patricia Campbell Hearst,
Defendant-Appellant.

[Filed Oct. 17, 1980]

OPINION

Appeal from the United States District Court
for the Northern District of California

William H. Orrick, Jr., District Judge, Presiding
Argued and submitted March 10, 1980

Before: CHOY and GOODWIN, Circuit Judges, and THOMPSON,* District Judge.

CHOY, Circuit Judge:

Hearst appeals the district court's denial, without discovery or a hearing, of her motion for "habeas corpus," 28 U.S.C. § 2255. We affirm in part and vacate in part, and remand for further proceedings.

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*The Honorable Bruce R. Thompson, Senior United States District Judge for the District of Nevada, sitting by designation.

I. *Introduction*

Hearst was arrested in September 1975 for bank robbery. Soon after, she made incriminating statements, which were captured by jail officials on the "Tobin tape," in a jailhouse interview with her friend Tobin. F. Lee Bailey and his associate J. Albert Johnson entered the case on October 2 as Hearst's counsel and prepared a defense based on a coercion theory. They did not move for a change of venue or for a continuance on the ground of pretrial publicity, choosing instead to rely on the voir dire of the prospective jurors. Their motion to suppress the Tobin tape was denied. Trial began in February 1976. Bailey put Hearst on the witness stand; she took the Fifth Amendment in the presence of the jury. Hearst was convicted on March 20. Her motions for a new trial were denied. She took an unsuccessful appeal, and certiorari was denied. 563 F.2d 1331 (9th Cir. 1977), *cert. denied,* 435 U.S. 1000 (1978). Bailey and Johnson were fired, and through present counsel Hearst filed a § 2255 motion, which Judge Orrick denied without a hearing. 466 F. Supp. 1068 (N.D. Cal. 1978). While the appeal from this ruling was pending, President Carter commuted Hearst's sentence.[1]

Most of the above is well known, for Hearst's case was a *cause celebre.* We now know, in addition, that during the course of the proceedings Bailey contracted to write a book about the trial, thus raising questions of potential or actual conflict of interest.

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[1]Although Hearst is no longer in federal custody, this case is not moot. Courtney v. United States, 486 F.2d 1108 (9th Cir. 1973). The district court on remand will have the power under § 2255 to vacate Hearst's conviction, if it finds such relief appropriate.

Bailey has admitted by affidavit that

> In February of 1976, I had received several offers to publish a book concerning the Hearst trial. A contract was eventually signed with C.P. Putnam, however, that contract was made contingent upon Ms. Hearst agreeing not to write about her experiences for a period of eighteen months subsequent to the publication. I indicated to Putnam that I would not submit any agreement on this subject to Ms. Hearst while the matter was still being litigated and the contract thus remained contingent upon Ms. Hearst's approval.

On March 22, 1976, Hearst signed the following covenant:

March 22, 1976

Putnam/Berkley Publishing Corp.
New York, New York
Gentlemen:

I understand that F. Lee Bailey is writing a book about my trial and life story as it pertains to the trial for which he will contract with you for publication in the United States and Canada.

As an inducement for you to publish this book, I hereby agree not to publish any account of my experiences in book, magazine, or any other form, prior to 18 months from your initial (hardcover) publication of Mr. Bailey's book, and I further agree to cooperate fully and exclusively with Mr. Bailey in his preparation and writing of the book in any manner he requires.

Very truly yours,

/s/ Patricia C. Hearst
Patricia Campbell Hearst

PCH.sm

Randolph Hearst, appellant's father, declared by affidavit that in September 1975 he discussed with Bailey the possibility of a book, and did not rule out the possibility. Mr. Hearst declared that he did not consider the book rights to be part of the fee arrangement for the trial. He declared further that "after . . . trial" Johnson told him that Bailey wanted to write a book about Ms. Hearst's trial, that this would be part of the fee arrangement for the appeal, and that Ms. Hearst would have to sign a covenant not to publish anything for eighteen months after the trial. Mr. Hearst, not knowing that Bailey had negotiated or contracted during the trial to write a book, told Johnson to tell Ms. Hearst that he had no objection to the arrangement Johnson had described.

Ms. Hearst declared by affidavit that before trial Johnson told her that Bailey would write a book about her, that the book rights were part of the fee arrangement her parents had made, that she had to agree to the arrangement but was not to discuss it, and that Johnson would someday ask her to sign a paper relating to it. She further declared that on March 22, two days after her conviction, Johnson brought her the covenant and said, "Remember the paper I would be bringing you to sign one day; well this is it"; that she did not have independent counsel, feel a sense of free will, or understand the effect of the covenant; and that it was never her desire that Bailey write a book about her or the trial.[2]

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[2]Hearst alleged that Bailey's book contract called for a $70,000 advance and a total of $225,000; that the advance was paid; that Bailey had a ghostwriter write "The Trial of Patty Hearst"; and that the publisher rejected the manuscript. Hearst declared by

II. *Hearst's Contentions*

Hearst makes the following contentions on appeal:

A. Her Sixth Amendment right to the assistance of counsel was violated when Bailey pursued his own interest in publication rights, rather than her interest in acquittal, by (1) failing to seek a continuance; (2) failing to seek a change of venue; (3) putting Hearst on the witness stand; (4) failing to investigate the Tobin tape issue; and (5) failing to investigate the possibility that involuntary ingestion of hallucinogens overcame Hearst's will.

B. Aside from any conflict of interest, Bailey's failure to pursue the defense based on the involuntary ingestion of hallucinogens was incompetence that violated the Sixth Amendment.

C. Aside from any conflict of interest, Bailey's failure to succeed in suppressing the Tobin tape was incompetence that violated the Sixth Amendment.

D. In any event, the Constitution forbade the introduction of the Tobin tape.

E. Because pretrial publicity made a fair trial impossible, the conviction was obtained without due process of law.

We vacate and remand for hearings under § 2255 on contentions (A)(1), (2), and (3). We affirm the district court's other rulings.

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affidavit that on August 1, 1977, Bailey wrote her that since the book had not been published yet, there was no need for the covenant and she could consider it null and void.

A. *Conflict of Interest*

Hearst claims that Bailey's book contract created a conflict of interest that deprived her of her Sixth Amendment right to the assistance of counsel. This alleged conflict was not total, for surely the salability of Bailey's book would have been enhanced had he gained an acquittal for Hearst. Nonetheless, Hearst charges that Bailey (1) failed to seek a continuance, so public interest would not cool and competing authors would not get the jump on him; (2) failed to seek a change of venue, because publicity would be maximized by a trial in San Francisco, a media center and the home of the Hearst family; and (3) put her on the witness stand, so her story would go on the public record and he would not be constrained by the attorney-client confidentiality rules. These decisions prejudiced Hearst, she says, because the case came to trial in the full heat of prejudicial publicity, and she was forced to plead the Fifth forty-two times in the presence of the jury.

The Government and Bailey denied that Bailey's book interest played any role in these tactical decisions, and advanced plausible reasons why he made those decisions.

The district court denied relief, on the grounds that counsel's reasonable tactical decisions could not be challenged, and that Hearst had not shown actual prejudice. 466 F. Supp. at 1075-76, 1083, 1087.

We hold that the district court erred in denying Hearst a hearing on these issues.[3] On remand, the district court

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[3]Hearst's implausible arguments that Bailey's book conflict hamstrung his investigation of the Tobin tape issue and influenced

should conduct a hearing and apply to the facts the law recently laid down by the Supreme Court in *Cuyler v. Sullivan*, ... U.S. ....., 48 U.S.L.W. 4517 (1980).

1. *The Cuyler v. Sullivan Test*

In *Cuyler v. Sullivan*, a decision of which the district court did not have the benefit, the Supreme Court considered a claim that retained counsel's conflict of interest violated the client's Sixth Amendment right to the assistance of counsel. Sullivan sought federal habeas corpus relief from a state conviction, whereas Hearst's conviction was federal; Sullivan's lawyer's conflict was based on multiple representation, whereas Hearst's was based on private financial interests. These differences are immaterial. We consider the rules laid down in *Sullivan* to be directly applicable to the present case, and they should govern the case on remand.

The *Sullivan* Court held that counsel's mere potential conflict of interest does not entitle a convict to relief. "In order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance." *Id.* at 4521. But "a defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to gain relief." *Id.*

We read *Sullivan* to define an actual, as opposed to a potential, conflict as one which in fact adversely affects

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him not to pursue a defense based on her involuntary ingestion of hallucinogens were not raised below; we will not consider them on appeal.

the lawyer's performance. But the requirement that the petitioner show this adverse effect is not the same as the requirement of *Cooper v. Fitzharris,* 586 F.2d 1325 (9th Cir. 1978), *cert. denied,* 440 U.S. 974 (1979), that the petitioner show that counsel's incompetent assistance resulted in actual prejudice. For example, overwhelming evidence of guilt might (as in *Cooper* itself) make almost impossible a showing that a relatively minor error resulted in actual prejudice. But such evidence would be completely irrelevant to an inquiry whether the same error, if caused by an actual conflict of interest, showed an adverse effect on counsel's performance.

2. *Requirement of a Hearing*

When a § 2255 motion is made, "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon." 28 U.S.C. § 2255. The standard is essentially whether the movant has "stated a claim on which relief could be granted," *Moore v. United States,* 571 F.2d 179, 184 (3rd Cir. 1978)—or, where affidavits have been submitted, whether summary judgment for the Government is proper. *See also* Fed. R. Civ. P. 12(b), 56. Under the standard established by the statute and the cases interpreting it, the district court should not have denied Hearst's conflict-based claims without a hearing.

The Ninth Circuit's rule is that "merely conclusionary statements in a § 2255 motion are not enough to require a hearing." *Wagner v. United States,* 418 F.2d 618, 621 (9th Cir. 1969). This does not, however, "mean that the

moving party must detail his evidence. It means only that he must make factual allegations, as [movant] has done." *Id.*

On the other hand, in certain cases the "factual allegations" are so "palpably incredible," so "patently frivolous or false," *see Blackledge v. Allison,* 431 U.S. 63, 76 (1977), that it is clear the movant is not entitled to relief or even to a hearing. "The court may appraise a petition by what is reasonably credible." *Cassidy v. United States,* 457 F.2d 813 (9th Cir.) (per curiam), *cert. denied,* 409 U.S. 1026 (1972).

These principles are well illustrated by *Machibroda v. United States,* 368 U.S. 487 (1962). There, the movant's § 2255 motion and affidavit made detailed factual allegations, which were countered by an affidavit introduced by the Government. The district judge concluded without a hearing that the allegations were false, and denied relief. The Supreme Court vacated and remanded, saying,

> This was not a case where the issues raised by the motion were conclusively determined either by the motion itself or by the "files and records" in the trial court. The factual allegations contained in the petitioner's motion and affidavit, and put in issue by the affidavit filed with the Government's response, related primarily to purported occurrences outside the courtroom and upon which the record could, therefore, cast no real light. Nor were the circumstances alleged of a kind that the District Judge could completely resolve by drawing upon his own personal knowledge or recollection.
>
> We cannot agree with the Government that a hearing in this case would be futile because of the appar-

> ent lack of any eyewitnesses to the occurrences alleged . . . . ". . . The Government's contention that his allegations are improbable and unbelievable cannot serve to deny him an opportunity to support them by evidence. On this record it is his right to be heard." [Citation.]
>
> . . . .
>
> There will always be marginal cases, and this case is not far from the line. But the specific and detailed factual assertions of the petitioner, while improbable, cannot at this juncture be said to be incredible. If the allegations are true, the petitioner is clearly entitled to relief. Accordingly, we think the function of 28 U.S.C. § 2255 can be served in this case only by affording the hearing which its provisions require.

Id. at 494-96.

In this case, the district court could not properly rely on the apparent regularity of the record and of Bailey's "tactical" decisions, 466 F. Supp. at 1075, 1083, to "conclusively show" that Hearst was entitled to no relief, because her motion was based on a circumstance, not appearing on the record, that allegedly affected Bailey's judgment. *See Sanders v. United States,* 373 U.S. 1, 19-20 (1963) (hearing must be granted on § 2255 claim that apparently regular guilty plea was invalid because defendant was under influence of narcotics). Bailey's potential conflict of interest is virtually admitted, and Hearst has alleged an actual conflict and adverse effect in sufficient and not implausible detail.

We conclude that Hearst is entitled to a hearing on the truth of her allegations.[4]

3. *Discovery*

Hearst alleged that Bailey was negotiating with publishers before the trial, when certain challenged decisions were made; she offered to prove it through depositions and discovery from Bailey's publisher and its editor-in-chief.

In § 2255 cases, "A party may invoke the processes of discovery . . . if, and to the extent that, the judge in the exercise of his discretion and for good cause shown grants leave to do so, but not otherwise." Rule 6 (following § 2255); *see Argo v. United States,* 473 F.2d 1315,

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[4]The Supreme Court has noted that although the standards for disposing without a hearing of habeas corpus petitions by state and federal prisoners are theoretically "exactly commensurate," in practice

> a motion under § 2255 is ordinarily presented to the judge who presided at the original conviction and sentencing of the prisoner. In some cases, the judge's recollection of the events at issue may enable him summarily to dismiss a § 2255 motion, even though he could not similarly dispose of a habeas corpus petition challenging a state conviction but presenting identical allegations. . . . To this extent, the standard may be administered in a somewhat different fashion.

Blackledge v. Allison, 431 U.S. 63, 74 n.4 (1977).

Since Judge Orrick's decision to deny a hearing was based on his reading of the trial record, however, not on his personal recollection of the trial, the standard must be administered strictly here. Although Judge Orrick presided at Hearst's sentencing and considered the § 2255 motion which is the subject of this appeal, the late Judge Oliver J. Carter presided at Hearst's trial.

1317 (9th Cir.), *cert. denied,* 412 U.S. 906 (1973). The district court, because of its belief that Hearst's § 2255 motion was meritless, refused to allow Hearst to take discovery under Rule 6. On remand, the district court should again consider the question of discovery.

B. *Ingestion of Drugs—Attorney Incompetence*

The district court correctly found that Hearst had no possibility of demonstrating that Bailey's representation was incompetent to the extent that he failed to investigate fully the possibility that involuntary ingestion of hallucinogens overcame Hearst's will. 466 F. Supp. at 1086-87. The only evidence of this ingestion, besides Hearst's vague assertion that she had experienced drug-type sensations, was a double hearsay account of Donald DeFreeze's unfocused statement of future possibilities.[5] No psychiatric report suggested that hallucinogens had affected Hearst's behavior, and several psychiatrists told Bailey that the symptoms she reported could have been a normal reaction to light after one has been blindfolded. If this drug defense had been unsuccessfully proffered the credibility of Hearst's entire defense might have been destroyed. Bailey acted well within the scope of "reasonably competent and effective representation," *Cooper v. Fitzharris,* 568 F.2d at 1327, when he devoted his energies to other aspects of Hearst's defense. Even in the unlikely event that this decision was a mistake, there was still no constitutional dereliction. *See id.* at 1330.

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[5]DeFreeze was a leader of the Symbionese Liberation Army, the group which kidnapped Hearst.

C. *The Tobin Tape—Attorney Incompetence*

As the district court found, the record demonstrates that Bailey and his co-counsel made satisfactory, if not brilliant, investigation and presentation of the facts and law that might have resulted in the suppression of the Tobin tape. 466 F. Supp. at 1078, 1079 n.17, 1086. Thus the court did not err by ruling, without a hearing, that Hearst could not demonstrate that Bailey's representation on this issue fell below the "reasonably competent and effective" level. *See* 586 F.2d at 1327.

D. *The Tobin Tape—Fourth Amendment*

Hearst claims that the Tobin tape was the fruit of a Fourth Amendment violation and should have been suppressed. The Government provided her a full and fair opportunity to raise this issue on direct appeal; therefore, it cannot be raised on collateral review. *Tisnado v. United States,* 547 F.2d 452, 456 (9th Cir. 1976); *see Stone v. Powell,* 428 U.S. 465, 494 (1976). If the provided opportunity has been squandered due to defense counsel's incompetence or misconduct, a convict's only option on collateral review is a Sixth Amendment claim based on inadequate assistance of counsel. *See Canary v. Bland,* 583 F.2d 887, 890 (6th Cir. 1978). We held in Part II.C, *supra,* that Hearst received adequate assistance of counsel on the Tobin tape issue.

E. *Pretrial Publicity—Due Process*

Hearst claims that the huge amount of prejudicial pretrial publicity made it impossible for her to receive the fair trial guaranteed by the Fifth Amendment's Due Pro-

cess Clause. Bailey did not make this claim at trial or on direct appeal, nor did he move for a continuance or change of venue to alleviate the problem; instead, he relied on the voir dire to obtain unbiased jurors. The § 2255 court held that this constituted a waiver of Hearst's due process/fair trial objection, and that no "cause" was alleged or "prejudice" shown, *see Wainwright v. Sykes*, 433 U.S. 72 (1977), to justify permitting the waived objection to be litigated collaterally. 466 F. Supp. at 1073-76.

In federal criminal cases, all defenses and objections based on defects in the institution of the prosecution or non-jurisdictional defects in the indictment or information must be raised before trial, or else are waived (although "the court for cause shown may grant relief from the waiver"). Fed. R. Crim. P. 12(b)(1)-(2), (f). A waived challenge of the grand jury cannot be litigated collaterally. *Davis v. United States*, 411 U.S. 233, 242 (1973). Challenges of the petit jury are treated the same as challenges of the grand jury. *Shotwell Manufacturing Co. v. United States*, 371 U.S. 341, 362 (1963). It follows that Hearst's due process/fair trial objection was waived.

Although Hearst did not explicitly identify Bailey's conflict of interest as the "cause" for this waiver, her allegations that this conflict induced Bailey to fail to move for a continuance or a change of venue sufficiently raised a claim of *Sykes* and Rule 12(f) "cause" before the § 2255 district court. But we note that Hearst's allegations in contentions (A)(1) and (2), that Bailey's failure to make these motions violated her Sixth Amendment rights, are substantially identical to her allegation of "cause." If she

can establish actual conflict of interest and a Sixth Amendment violation, she establishes "cause"; by the same token, she cannot show "cause" without showing an actual conflict.

Once Hearst established an actual conflict of interest with adverse effect on her counsel's performance, she would be entitled to relief on contentions (A)(1) and (2) even if no prejudice to her chance of acquittal at trial appeared. Therefore, if Hearst is entitled to relief on contentions (A)(1) and (2) she will gain the relief she seeks through contention (E); yet if she is not entitled to relief on the former contentions, she could not be entitled to relief on the latter contention (because she would not have established "cause"). Since the district court's decision on contentions (A)(1) and (2), which we have remanded for a hearing, will effectively moot contention (E), we see no reason to disturb the district court's decision on that issue.

III. *Attorney Discipline*

A. *Standards of Conduct*

Under Federal Rule of Appellate Procedure 46, a Court of Appeals can discipline any attorney who practices before it for "conduct unbecoming a member of the bar." *See In re Chandler,* 450 F.2d 813 (9th Cir. 1971). This language is not unconstitutionally vague. It refers to the legal profession's "code of behavior" and "lore," of which all attorneys are charged with knowledge and of which the American Bar Association Code of Professional Responsibility (ABA CPR) is an illustration. *In re Bithoney,* 486 F.2d 319, 324 & n.7 (5th Cir. 1973). In addition,

members *pro hac vice* of the bar of the United States District Court for the Northern District of California are charged with knowledge of the disciplinary rules of the State Bar of California, as well as those of their home jurisdiction.

B. *Bailey's Conduct*

The allegations and admissions in the record of the present case raise serious questions as to whether Bailey and, to the extent of his participation, Johnson have been guilty of conduct unbecoming members of the bar.

1. *The Book Contract*

Bailey's book contract created a potential conflict of interest; this case tests whether it ripened into an actual conflict of interest. Therefore, Bailey may have violated ABA CPR Disciplinary Rule 5-101(A), which reads:

> Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.

The obvious reason for this rule is well expressed in ABA CPR Ethical Consideration 5-1:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Bailey's book contract might not fall within ABA CPR Disciplinary Rule 5-104(B), *see infra,* because the contract itself was not an acquisition *from the client* of an interest in publication rights. Nonetheless, Rule 5-104(B) recognizes the dangers inherent in simultaneous lawyering and authoring.[6] Moreover, all courts before which the issue has been raised have disapproved the practice of attorneys arranging to benefit from the publication of their clients' stories. *See Ray v. Rose,* 491 F.2d 285, 289 (6th Cir.), *cert. denied,* 417 U.S. 936 (1974); *Ray v. Rose,* 535 F.2d 966, 974 (6th Cir.), *cert. denied,* 429 U.S. 1026 (1976); *Wojtowicz v. United States,* 550 F.2d 786, 793 (2d Cir.), *cert. denied,* 431 U.S. 972 (1977); *People v. Corona,* 80 Cal. App. 3d 684, 720-21, 727, 145 Cal. Rptr. 894, 915-16, 920 (1978); *Maxwell v. Superior Court,* 101 Cal. App. 3d 341, ..., ..., ..., 161 Cal. Rptr. 849, 854-56, 861 (1980).

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[6]This recognition becomes even more explicit in Rule 1.9(d) of the Discussion Draft of the ABA Model Rules of Professional Conduct, *reprinted in* 48 U.S.L.W., No. 32, at 8 (Feb. 19, 1980):

> Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary rights to a matter arising from the representation.

The Comment to that proposed Rule reads in part:

> An agreement by which a lawyer acquires literary rights concerning the subject matter of the representation involves incompatible standards for the lawyer's performance, one being effectiveness in representing the client and the other being performance that has literary value. Even after conclusion of representation, a lawyer may make use of information about a client in an account of professional experience only to the extent permitted by Rule 1.7.

The proposed Rule, if in effect at the time, would explicitly have prohibited Bailey's book contract.

In light of Rule 5-101(A), Bailey's decision to enter into a book contract during the course of the trial was most unfortunate. Potential and actual conflicts of interest always bring disrepute upon the bar, the court, and the law. They do so to an even greater degree when the case is a *cause célèbre* and the attorney has the reputation of being an outstanding lawyer. Moreover, Bailey is in no position to claim that the book contract was necessary to finance his fee.

2. *The Covenant*

ABA CPR Disciplinary Rule 5-104(B) reads:

> Prior to conclusion of all aspects of the matter giving rise to his employment, a lawyer shall not enter into any arrangement or understanding with a client or a prospective client by which he acquires an interest in publication rights with respect to the subject matter of his employment or proposed employment.

Even though Bailey's book contract itself technically might not violate this Rule, Hearst's March 22 covenant to cooperate exclusively with Bailey and not to publish on her own was obtained pursuant to his representation and, we believe, constituted an "interest in publication rights." Although Hearst's trial had ended on March 22, Bailey's representation of Hearst had not. He continued to represent her through a motion for new trial, a second motion for new trial, sentencing, a direct appeal to this Court, a petition for rehearing en banc, a petition for certiorari, a motion to vacate a concurrent sentence, and a Rule 35 motion to reduce sentence. Thus, Bailey was apparently in violation of ABA CPR Disciplinary Rule 5-104(B) from March 22, 1976, onward.

3. *The Fraud on the Client*

Bailey admits the book contract; the covenant is in the record. The allegations suggesting fraud are not so well established. However, if proved, they would tend to show that Bailey and Johnson misled Randolph Hearst and appellant regarding the finality of the agreement for a book, the subject of the book, the duration of the covenant, the application of the proceeds, and appellant's obligation to sign the covenant. The allegations regarding the background, manner and timing of the presentation of the covenant to appellant for signing indicate overreaching.

If all this is true, Bailey and Johnson may have violated ABA CPR Disciplinary Rule 1-102(A)(4):

> A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

Other disciplinary Rules might also be involved. Attention should also be directed to California Rule of Professional Conduct 5-101:

> A member of the State Bar shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless (1) the transaction and terms in which the member of the State Bar acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in manner and terms which should have reasonably been understood by the client, (2) the client is given a reasonable opportunity to seek advice of independent counsel of the client's choice on the transaction, and (3) the client consents in writing thereto.

C. *Disciplinary Proceedings*

We suggest that the district court, on remand, might find it advisable to issue to Bailey (and perhaps to Johnson as well) an order to show cause why he should not be disciplined, on the grounds noted above, in his capacity as a member *pro hac vice* of the bar of the United States District Court for the Northern District of California.[7]

IV. *Conclusion*

As to Hearst's contentions that Bailey suffered from an actual conflict of interest that adversely affected his performance, in that it caused him to fail to seek a continuance, to fail to seek a change of venue, and to put Hearst on the witness stand, the district court's denial of the motion for relief is VACATED, and the case REMANDED for reconsideration of Hearst's discovery request, and for a hearing.

As to all other matters, the judgment of the district court is AFFIRMED.

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[7]We choose not, at this time, to issue to Bailey an order to show cause why he should not be disciplined by the United States Court of Appeals for the Ninth Circuit. We will await the findings made in the district court's disciplinary proceedings, and do what appears necessary thereafter.

Appendix B

United States of America, Plaintiff,

v.

Patricia Campbell Hearst, Defendant.

No. CR-74-364 WHO.

United States District Court,
N. D. California.

Nov. 7, 1978.

OPINION

ORRICK, District Judge.

Patricia Campbell Hearst (herein "petitioner" or "defendant"), who is currently serving the remainder of a seven-year sentence for armed bank robbery, moves this Court, pursuant to 28 U.S.C. § 2255,[1] for an order vacating, setting aside, or correcting her sentence or, in the alternative, for an order reducing her sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. For the reasons hereinafter set forth, the motions, and each of them, are denied. In considering petitioner's application, it is appropriate to review briefly the background of these proceedings.

I.

During the night of February 4, 1974, petitioner was kidnapped at gunpoint from her Berkeley, California apartment. Two months later, following the repeated ef-

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[1]28 U.S.C. § 2255 is the equivalent of *habeas corpus* for federal prisoners. Defendant's motion will therefore be referred to as an "application" or a "petition."

forts of her parents to ransom her, she announced in a taped message that she had repudiated her former lifestyle, and was determined to "stay and fight" beside her captors, the Symbionese Liberation Army ("SLA"). Shortly thereafter, on April 15, 1974, petitioner, wielding a sawed-off carbine, took part in an armed robbery of the Hibernia Bank in San Francisco, in which three bystanders were wounded. This dramatic event was followed by a shoplifting incident in Los Angeles, at which petitioner, covering the escape of her SLA companions, riddled a sporting goods store with numerous rounds from an automatic weapon. In May, the State of California filed nineteen criminal charges against the defendant, including assault with intent to commit murder, assault with a deadly weapon, robbery, and kidnapping.

On June 6, 1974, Ms. Hearst was indicted by a federal grand jury for armed bank robbery, 18 U.S.C. § 2113(a) (d), and for using a firearm to commit a felony, 18 U.S.C. § 924(c). She remained a fugitive for fourteen months until she was apprehended in San Francisco on September 18, 1975, in an apartment which she shared with one Wendy Yoshimura. Evidence recovered from the apartment included ammunition, and so-called "bait bills" from the robbery of a bank in Carmichael, California, in which one person was killed. In addition, officers seized various SLA documents, including one called "Tania Interview," written partly in petitioner's own hand, describing her reasons for having joined the SLA, including her severe dislike for her parents and a hatred of her lifestyle. When booked upon her arrest, she stated her occupation as "urban guerrilla."

In the several months which followed, petitioner underwent extensive physical and psychiatric examination, and was declared competent to stand trial. Jury selection, which included individual, *in camera voir dire* of nearly sixty potential jurors, commenced on January 27, 1976, and was completed on February 4, 1976. The jury was then sequestered, and remained so during the entire eight weeks of the trial.

Petitioner's defense was straightforward: She alleged that she did not intend to participate in the bank robbery but did so only under the threat of bodily harm. Therefore, the question of whether or not she had the requisite intent to commit the crime became the sole issue of fact to be tried. To prove her defense, Ms. Hearst took the witness stand and told in exhaustive detail of the grueling, distasteful ordeal that she underwent with the SLA after her kidnapping, including her atrocious and outrageous mistreatment in the closet where she was kept blindfolded for days without relief. Three psychiatrists testified on her behalf that she had been coerced by the SLA, particularly the Harrises, into robbing the bank. Petitioner told of her journey across the country with Jack Scott to New York, including the time she spent in a Pennsylvania farmhouse, and of her return west to Las Vegas. She then refused to answer, forty-two times, when queried about her activities during the period from her return to Las Vegas in the fall of 1974 until her arrest in San Francisco a year later.

In rebuttal, the government presented the testimony of two psychiatrists that she in fact knew what she was doing when she participated in the bank robbery, and that she

was not coerced but performed her acts voluntarily. This testimony was supplemented with other evidence, including the testimony of Tom Matthews, one of the men whom Ms. Heart and the Harrises had kidnapped in Los Angeles, who testified that Ms. Hearst told him of her voluntary role in the bank robbery.

In all, the jury listened to testimony from seventy-five witnesses and considered one hundred eighty-six exhibits. Within forty-eight hours after being charged, the jury returned a verdict of guilty. Simply stated, the jury apparently believed that Ms. Hearst had participated freely in the robbery and did not believe the coercion theory presented by her defense.

On September 24, 1976, this Court[2] sentenced petitioner to seven years on Count I, for armed bank robbery, and to two years on Count II, for use of a weapon to commit a felony, the sentences to be served concurrently.[3] Following

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[2]The case was tried before former Chief Judge Oliver J. Carter. Following the trial, Judge Carter, pursuant to 18 U.S.C. § 4205(c), committed the defendant to the custody of the Attorney General for the purpose of obtaining additional information concerning her mental state prior to imposing a final sentence. Before the study could be completed, Judge Carter died unexpectedly of a heart attack. In accordance with the local rules, the case was then assigned by lot to this Court to conduct, pursuant to Rule 25(c) of the Federal Rules of Criminal Procedure, such post-trial proceedings as were deemed necessary.

[3]In reviewing the record, the Court has determined, based upon *Simpson v. United States*, 435 U.S. 6, 98 S.Ct. 909, 55 L.Ed.2d 70 (1978), which holds that a defendant may not properly be tried for both armed robbery, 18 U.S.C. § 2113(a)(d), and use of a firearm to commit a felony, 18 U.S.C. § 924(c), that defendant's sentence on Count II must be and is vacated. However, this action will have no practical effect, since the sentences are being served concurrently.

two unsuccessful motions for a new trial,[4] defendant took an appeal.[5] In attacking the fairness of her trial, she objected to some six major rulings by the trial court on contested items of evidence, including: the admission of evidence relating to crimes committed after the robbery of the Hibernia Bank; the admission into evidence of the so-called "Tobin tape"; the exclusion of psycholinguistic testimony and certain taped interviews, offered on behalf of the defendant; the Court's decision requiring the defendant to plead the Fifth Amendment, if at all, in the presence of the jury; and the Court's decision to permit government experts to testify as to ultimate issues of fact. Each of these contentions was carefully considered, and rejected, by the United States Court of Appeals for the Ninth Circuit, which affirmed the conviction. *United States v. Hearst,* 563 F.2d 1331 (9th Cir. 1977). The Supreme Court of the United States subsequently denied defendant's petition for a writ of *certiorari*, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978).

With new counsel, petitioner now moves this Court under 28 U.S.C. § 2255 for an order vacating her sentence or, alternatively, for an order reducing her sentence, pursuant

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[4]*See United States v. Hearst,* 424 F.Supp. 307 (N.D.Cal. 1976); *United States v. Hearst,* 435 F.Supp. 29 (N.D.Cal. 1976).

[5]The defendant actually filed two appeals: one from her conviction (September 24, 1976), and another from the denial of her motion to reconsider denial of an earlier motion for a new trial (February 11, 1977). These appeals were consolidated for hearing by the Court of Appeals. *United States v. Hearst,* 563 F.2d 1331 (9th Cir. 1977), *cert. denied,* 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed. 2d 90 (1978).

to Rule 35 of the Federal Rules of Criminal Procedure.[6] She states three reasons why the criminal justice system failed to provide her with a fair trial. First, petitioner claims that massive pretrial publicity made it impossible to select an impartial jury in San Francisco, where the case was tried. Second, she contends that admission into evidence of a tape recording made while she was being held in pretrial detention (the Tobin tape) constituted a denial of due process. Third, she alleges that trial counsel, Mr. F. Lee Bailey, failed to render effective assistance of counsel in her defense.

In adjudicating motions pursuant to 28 U.S.C. § 2255, the Court is directed to "grant a prompt hearing thereon," unless "the motion and files and records of the case conclusively show that the prisoner is entitled to no relief • • •." *See Fontaine v. United States,* 411 U.S. 213, 215, 93 S.Ct. 1461, 1462, 36 L.Ed.2d 169 (1973); *Battaglia v. United States,* 469 F.2d 686 (9th Cir. 1972), *cert. denied,* 411 U.S. 949, 93 S.Ct. 1932, 36 L.Ed.2d 411 (1973). To explicate somewhat this bald standard, Judge Mansfield has stated:

> "[A] judge is well within his discretion in denying a petition when the supporting affidavit is insufficient on its face to warrant a hearing. [citations omitted] • • • In making that threshold determination the court looks primarily to the affidavit or other evidence proffered in support of the application in order to determine whether, if the evidence should be offered at a hearing,

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[6] As a supplement to these motions, petitioner requests leave, pursuant to Rule 6 of the Rules Governing Section 2255 Proceedings, to invoke further discovery. Because of its disposition of petitioner's Section 2255 motion, the Court has no occasion to address this request.

it would be admissible proof entitling the petitioner to relief." *Dalli v. United States*, 491 F.2d 758, 760 (2d Cir. 1974).

Accordingly, this Court has reviewed in detail not only the voluminous exhibits submitted by petitioner in support of her motion,[7] but also the prior record in the case, including the five reported decisions, the reporter's trial transcript, and the countless papers and briefs submitted at all stages of the proceedings. On the basis of these materials, the Court finds with respect to each of petitioner's contentions, that none of the evidence offered in her behalf, even if clearly established at an evidentiary hearing, would entitle her to relief. The Court now turns to a consideration of each of petitioner's claims *seriatim*.

II.

Petitioner's claim that pretrial publicity rendered her trial inherently unfair is grounded in the contention, made now for the first time, that pervasive media coverage of her case made it impossible to obtain an impartial jury in the Northern District of California, where her trial was held. There can be no doubt that Patricia Hearst and her captors were the subjects of the most extensive news coverage in recent history. The media fully exploited the public's fasci-

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[7]The volume of material submitted by petitioner in support of her motions has no parallel in the experience of this Court with *habeas corpus* petitions. In addition to motions and supporting memoranda totalling 180 pages, she has submitted over 2,200 pages of supporting exhibits and affidavits, all of which was recently supplemented by a copy of her request for Executive Clemency, a document of 250 pages in length. The repetitious and often disorganized character of these materials has made the Court's task a difficult one indeed.

nation with the deeds of the SLA, a small band of self-avowed terrorists. For fourteen months, the group eluded a team of more than one hundred Federal Bureau of Investigation ("FBI") agents, which in the course of their pursuit interviewed over twenty-five thousand citizens, following leads from nearly every state in the nation. News articles from as far away as Thailand, Australia, Belgium and France attest to the fact that interest in these events was international in scope. Defendant has filed with the Court over two thousand pages of newspaper clippings gathered in three American cities alone. These items are a reminder of the tremendous national attention which this story received—on television, radio, and in the print media—during a period of two years.[8]

Petitioner rests her argument on the ground that news reporting of these extraordinary events was so pervasive, and had such an overwhelming impact upon members of the jury, that a "presumption" arose that her trial was unfair. She claims further that the *voir dire* conducted by the trial judge was completely ineffective to mitigate the results of this prejudice, and that certain events during the trial compounded the unfairness by reminding the jury of the prejudicial pretrial publicity.

It is unnecessary for the Court to consider the merits of petitioner's arguments, for her failure to raise them prior to trial or on appeal precludes relitigation here. *Davis v.*

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[8]The Court notes that editors and managing editors polled by the Associated Press voted the Hearst story the top California news story of 1975—ahead of assassination attempts on President Ford in Sacramento and San Francisco, and Governor Edmund Brown, Jr.'s first year in office. Contra Costa Times, January 2, 1976.

United States, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973); Fed.R.Cr.P. 12(b)(f). The appropriate remedy for prejudicial publicity is a motion for a transfer of venue, pursuant to Rule 21(a) of the Federal Rules of Criminal Procedure.[9] No such motion having been made prior to trial, nor argued in any of defendant's subsequent attacks on her conviction,[10] she is in no position to raise it here for the first time.

Recent Supreme Court decisions concerning the availability of federal *habeas corpus* for the litigation of claims which should have been raised at trial persuade this Court that consideration of defendant's claims in this proceeding would be inappropriate. *Davis v. United States, supra; Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Rule 12(b)(f) of the Federal Rules of Criminal Procedure[11] provides that failure to raise issues concerning

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[9]The rule provides:

> "The court upon motion of the defendant shall transfer the proceedings as to him to another district whether or not such district is specified in the defendant's motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial at any place fixed by law for holding court in that district." Fed.R.Cr.P. 21(a) (1975).

[10]*See United States v. Hearst*, 563 F.2d 1331 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978); *United States v. Hearst*, 435 F.Supp. 29 (N.D.Cal. 1977); *United States v. Hearst*, 424 F.Supp. 307 (N.D.Cal. 1976).

[11]The rule provides in pertinent part:

> "(b) Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral

defects in the institution of criminal proceedings constitutes a waiver thereof. Although by its express terms, the rule refers only to defects in "the institution of the prosecution" or in "the indictment or information," it has been held to encompass challenges to the selection and composition of the petit jury as well. *Shotwell Manufacturing Co. v. United States,* 371 U.S. 341, 362, 83 S.Ct. 448, 9 L.Ed.2d 357 (1963); *Frazier v. United States,* 335 U.S. 497, 503, 69 S.Ct. 201, 93 L.Ed. 187 (1948); *Fernandez v. Meier,* 408 F.2d 974 (9th Cir. 1969). Under the principles set forth by the Supreme Court in *Davis,* failure to comply with the rule prevents the issue from being raised in collateral attack pursuant to 28 U.S.C. § 2255, absent a showing of cause and some demonstration of actual prejudice arising from the alleged constitutional violation. *Davis v. United States, supra,* 411 U.S. at 242, 93 S.Ct. 1577.

The clear purpose underlying the rule is to insure that constitutional and other defects, which can be remedied at

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at the discretion of the judge. The following must be raised prior to trial:

(1) Defenses and objections based on defects in the institution of the prosecution; or

(2) Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or

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(f) Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." Fed.R.Cr.P. 12(b)(f) (1975).

trial, are not withheld by the defense in the hope that, should the trial result in a conviction, the error can then be unveiled in an attempt to void the proceedings. *Id.* at 241, 93 S.Ct. 1577; *Wainwright v. Sykes, supra,* 433 U.S. at 89-90, 97 S.Ct. 2497. In *Davis,* the Court articulated such reasoning as follows:

> "If its time limits are followed [those of Rule 12(b)], inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." *Davis v. United States, supra,* 411 U.S. at 241, 93 S.Ct. at 1582.

These principles were elaborated in *Wainwright v. Sykes, supra,* where the *Davis* rule was extended to deny *habeas corpus* to a defendant who claimed that an involuntary confession had been introduced at his trial. *Id.* 433 U.S. at 87, 97 S.Ct. 2497; see *Francis v. Henderson,* 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976).

These considerations compel the same results here. A timely motion for transfer of venue would have enabled the trial judge to assess the impact of news coverage in the Northern District of California, and to order appropriate relief, if necessary. In the face of defendant's

silence, the court proceeded to conduct a detailed *voir dire* (*see infra*), and an eight-week jury trial, at the conclusion of which defendant was found guilty. To permit the issue to be raised at this point would reduce to nothing the considerable efforts of the jury, the trial judge, counsel for both parties, and the seventy-three witnesses who testified at the trial.

Defendant can escape the effect of her waiver by showing "good cause" for her failure to raise objections prior to the trial and actual prejudice resulting from the alleged constitutional violation. *Wainwright v. Sykes, supra,* 433 U.S. at 84, 97 S.Ct. 2497. However, nothing submitted by petitioner even approaches such a showing. It is clear from an examination of the record that the failure to move for a change of venue was a considered, tactical decision. Defendant's Memorandum in Support of Individual and Detailed Voir Dire, submitted on January 1, 1976, prior to her trial, states:

> "The defendant has made no motion for a change of venue, since the aforementioned publicity has permeated every American community, no matter how large or how small. Nor has the defendant made a motion for a continuance based upon an inability to obtain a fair trial within the mandates of constitutional due process predicated upon the voluminous and continuing pre-trial publicity, preferring instead to determine the extent to which the defendant may have been prejudiced in her ability to obtain a fair trial through *voir dire* examination." *Id.* at 1-2.

Having made this deliberate choice, petitioner will not now be heard to complain, for it is well-settled that a

decision to waive objections due to strategic considerations will not be reexamined in collateral proceedings. *Fay v. Noia*, 372 U.S. 391, 438-439, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963); *Henry v. Mississippi*, 379 U.S. 443, 451-452, 85 S.Ct. 564, 13 L.Ed.2d 408 (1965).

Nor is anything submitted by petitioner sufficient to make out a showing of prejudice actually suffered. She relies principally upon the assertion that media coverage of her case was less comprehensive in other areas of the country than in the Northern District of California, where she was tried. In support of this contention, she has submitted news clippings covering the period from September 19, 1975, to January 31, 1976, which purport to represent pretrial newspaper coverage of her case in three major cities: San Francisco, Dallas, and Detroit. Defendant's Exhibits ID, IE, and IF. Defendant argues that because the *volume* of coverage was heavier in the San Francisco area, either of the latter two locations (or virtually any jurisdiction outside of California) would have offered defendant a better opportunity to obtain an impartial jury. But a showing of "actual prejudice" cannot rest upon speculative assertions such as these. Nor do petitioner's conclusions necessarily follow. She has presented no evidence which suggests that citizens outside of California were substantially less familiar with the celebrated facts of her case than were residents of San Francisco. Indeed, the national coverage of her story, and its domination of the media for so many weeks, make it appear unlikely to this Court that any jurisdiction could be found whose

inhabitants were unfamiliar with the Patricia Hearst story. Thus, accepting all defendant says as true, this evidence is insufficient to demonstrate that her jurors were unfairly prejudiced against her.[12]

Petitioner fails even to address the issue of whether or not her failure to move for a corrective remedy prior to trial forecloses consideration of her claim here. A review of cases upon which she relies discloses that, in each one, timely motions for transfer or mistrial were made by trial counsel. *See Sheppard v. Maxwell,* 384 U.S. 333, 348, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Marshall v. United States,* 360 U.S. 310, 312, 79 S.Ct. 1171, 3 L.Ed.2d 1250 (1959); *Rideau v. Louisiana,* 373 U.S. 723, 724, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963); *Silverthorne v. United States,* 400 F.2d 627, 631 (9th Cir. 1968).

Were this Court called upon to pass judgment on the merits of petitioner's claims, it would find to a certainty that the extensive *voir dire* examination conducted by former Chief Judge Carter cured any possible prejudice arising from pretrial publicity. This circuit has established rigorous standards for the conduct of *voir dire* examinations in cases involving a significant threat of prejudice:

> "Therefore, when pretrial publicity is great, the trial judge must exercise correspondingly great care in all aspects of the case relating to publicity which might

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[12]Defendant has submitted the affidavits of six members of the jury by which she was found guilty. Not one questions the fairness of the verdict, or even suggests that pretrial publicity rendered it impossible to adhere to the trial court's instruction to decide the case on the evidence presented at trial alone. Affidavits of Mary Nieman, Helen Westin, Douglas McGregor, Philip Crabbe, Beatrice Bowman, and Bruce Braunstein.

> tend to defeat or impair the rights of an accused. The judge must insure that the voir dire examination of the jurors affords a fair determination that no prejudice has been fostered." *Id.* at 637-638.

See United States v. Polizzi, 500 F.2d 856 (9th Cir. 1974). In *Silverthorne,* the Court of Appeals set forth two criteria which must be met: (1) the questions posed on *voir dire* must not be "calculated to evoke responses which [are] subjective in nature," but must be designed "to elicit answers which provide an objective basis for the court's evaluation"; and (2) the court's examination must be directed to individual jurors. *Id.* at 638, 639.

Measured even by this strict standard, the trial court's *voir dire* was completely unassailable and the attack on Chief Judge Carter's *voir dire* examination completely unjustifiable. At defendant's request, jurors were examined individually, *in camera*—out of the presence of other veniremen, the press, and the public—to insure complete candor. *United States v. Hearst,* 412 F.Supp. 873 (N.D.Cal.1976). Defendant submitted a total of seventy-five proposed questions, nearly all of which were accepted and propounded by the trial judge. Over a period of several days, nearly sixty potential jurors were examined. Each was queried, slowly and deliberately, as to regular reading habits, television and radio exposure, recollection of each of the dramatic events enumerated above, conversations with friends and family concerning the case, and a litany of other pertinent matters. In some cases, jurors were asked in excess of one hundred separate questions. Counsel were given the opportunity to pose, through the trial judge, additional

questions. It simply cannot be gainsaid that this painstaking and deliberate process failed to produce objective data from which the trial judge and the parties could measure the impact of news reporting—indeed, this Court would be hard-pressed to recommend a single additional question which the trial judge could have posed.[13]

Nor has petitioner proffered sufficient evidence that events which allegedly occurred during the trial rendered the proceedings constitutionally unfair. Her specific claims are these: (1) that the location of the press box in the courtroom seriously distracted the jury's attention from the trial itself; (2) that remarks by the trial judge concerning the bank robbery in Carmichael were highly prejudicial; and (3) that trial counsel's cross-examination of Dr. Fort, the government's principal psychiatric witness, made the jury aware of extraneous, prejudicial information. Of course, to the extent that trial counsel's decision not to request a mistrial on these grounds constitutes a

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[13]At one point during the *voir dire*, defense counsel, apparently impatient with the deliberate manner in which Judge Carter was proceeding, asked if the individual examinations could be expedited. The judge responded in the following colloquy:

> "THE COURT: • • • I am going through this detailed examination to give you, both sides, all the information that you can possibly have for the purpose of exercising your peremptory challenges, as well as challenging for cause.
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> Mr. BAILEY: I appreciate that, Your Honor.
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> THE COURT: And this is one of the purposes of this detailed examination.
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> It is the desire of the Court to protect the right of the peremptory challenge; that has motivated me to delve into this more extensively than I have done in most any other case that I have ever tried, and I have tried many of them." R.T. 810.

considered, tactical choice, their impact is beyond the scope of inquiry here. *Henry v. Mississippi, supra,* 379 U.S. at 451-452, 85 S.Ct. 564. But further, these rather insignificant details, even when considered cumulatively, do not approach the showing of extraneous prejudice necessary to upset the trial as constitutionally unfair. *Cf. Sheppard v. Maxwell, supra,* 384 U.S. at 342-349, 86 S.Ct. 1507 (1966).

For these reasons, the Court finds that defendant's petition, and the record in the case, conclusively demonstrate that she is not entitled to relief on her claim that prejudicial publicity rendered her trial presumptively unfair.

III.

The Court now turns to petitioner's claim that admission into evidence at trial of the so-called "Tobin tape" constituted a denial of due process sufficient to vitiate her conviction.

A.

Following her arrest on September 18, 1975, defendant was detained until trial[14] at the San Mateo County Jail, where she was permitted to receive visitors. On September 20, she was visited there by Patricia Tobin, a childhood acquaintance who described herself at trial as defendant's "best friend." The two conversed in the jail's visiting room by means of a telephone intercommunication device, while facing each other through a glass partition. According to defendant's testimony, others were present in the room during her visit with Tobin.

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[14]On September 23, 1975, Judge Carter revoked defendant's bail.

This conversation was monitored and recorded by jail authorities using a switchboard-type device. The supervisor of the jail testified that such surveillance is regularly conducted in certain cases—particularly those of a highly public nature or which present unique security risks—and that a previous determination had been made to record all of defendant's visits. Indeed, defendant's comments during the conversation suggest a possible awareness on her part that surveillance was taking place. The tape recording was subsequently turned over to the government, and was played to the jury during the trial.

The content of defendant's conversation with Tobin was no doubt damaging to her cause. In cold and often profane language, defendant told her friend that her "politics" had changed, a fact which "creates all kinds of problems for me in terms of a defense"; that she hoped to issue a statement from a "revolutionary feminist perspective totally"; that she was angry about having been found; that she hoped to be able to aid Steven Soliah to make bail; and, finally, that she did not wish to become a "prisoner" in her parents' home.

Recognizing the damaging impact which her taped comments would surely have on the theory of her defense, defendant moved to suppress the tape as violative of her constitutional rights. At a suppression hearing on February 20, 1976, defense counsel examined the San Mateo County Sheriff and the commander of the San Mateo County Jail, both as to the techniques employed in and the purposes behind the surveillance of defendant's conversations. Judge Carter, relying principally on *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), and *Lanza v.*

New York, 370 U.S. 139, 82 S.Ct. 1218, 8 L.Ed.2d 384 (1962), refused to suppress the tape, finding that inmates have no reasonable expectation of privacy while incarcerated. *United States v. Hearst,* 412 F.Supp. 888, 889 (N.D. Cal. 1976). The tape was subsequently played for the jury, and the government was permitted to question defendant concerning her remarks to Tobin.

Following her conviction, defendant incorporated this issue as a major point in her appeal to the Ninth Circuit, arguing that use of the tape at trial violated her Fourth and Sixth Amendment rights. The Court of Appeals affirmed the conviction, rejecting defendant's argument on both grounds. With respect to her Fourth Amendment claim, the court relied upon decisions following *Katz* and *Lanza* which establish that prison surveillance does not violate the Constitution as long as undertaken "pursuant to a rule or policy with a justifiable purpose of imprisonment or prison security." *United States v. Hearst, supra,* 563 F.2d at 1345. The court deemed this rule dispositive in the light of its express finding that "the government adequately established that its practice of monitoring * * * prisoner-visitor conversations was a reasonable means of maintaining prison security." *Id.* at 1346. Defendant's Sixth Amendment claim was similarly dispatched by the holding, premised upon *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964), and *Brewer v. Williams,* 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 423 (1977), that no violation of the right to counsel can occur under such circumstances in the absence of formal or surreptitious interrogation of the defendant by the government itself. *Id.* at 1348.

B.

Petitioner now asks the Court to relitigate, in this collateral proceeding, her claim that the use of the Tobin tape violated her constitutional rights. At least insofar as her claim rests upon Fourth Amendment grounds, defendant's request plainly ignores the holding of *Stone v. Powell,* 428 U.S. 465, 96 S.Ct. 3037, 49 L.Ed.2d 1067 (1976), to the effect that *habeas corpus* relief is not available for search and seizure challenges which have been fully and fairly litigated at trial and on direct review. In support of its ruling, the Court stated:

> "While courts, of course, must ever be concerned with preserving the integrity of the judicial process, this concern has limited force as a justification for the exclusion of highly probative evidence. The force of this justification becomes minimal where federal habeas corpus relief is sought by a prisoner who previously has been afforded the opportunity for full and fair consideration of his search-and-seizure claim at trial and on direct review." Id. at 485-486, 96 S.Ct. at 3048 (footnote omitted).

The Court of Appeals in this circuit has interpreted the rule in *Stone v. Powell* to preclude relitigation of Fourth Amendment claims which have previously been heard in *either* state or federal court proceedings. In *Tisnado v. United States,* 547 F.2d 452, 456 (9th Cir. 1976), the court declared:

> "Thus, according to *Stone v. Powell,* a federal court may not grant either § 2254 or § 2255 habeas corpus relief on the basis that evidence obtained in an unconstitutional search or seizure was introduced, respectively, at a state or federal trial where the defendant

> was provided an opportunity to litigate fully and fairly his fourth amendment claim before petitioning the federal court for collateral relief."

Therefore, provided petitioner has had a full and fair opportunity to press her claim at trial and on appeal, she will not be permitted to retry the issue in this proceeding.

The Court finds that Ms. Hearst has been afforded ample opportunity to litigate her Fourth Amendment claim fully and fairly both in the trial court and on direct appeal from her conviction. As noted above, she was permitted to present testimony, brief and argue the point before the trial judge, and to brief and argue again to the Court of Appeals. These same points were raised in defendant's petition for *certiorari*, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90, which was denied by the Supreme Court. (1978).[15]

Defendant seeks to avoid this result by arguing that further evidence, not properly developed by trial counsel or presented heretofore, would provide the basis for a meritorious Fourth Amendment claim. In substance, defendant contends that trial counsel did not argue that the jail surveillance was undertaken solely for the purpose of gathering evidence for use at trial, rather than for jail security reasons. To support her position, she relies upon two footnotes to the Court of Appeals' opinion which suggest that no such argument had been presented there.[16]

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[15]Mr. Justice Brennan would have granted *certiorari* to hear this issue. *United States v. Hearst*, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed. 2d 90 (1978).

[16]*See United States v. Hearst*, 563 F.2d 1331, 1345-1346 nn. 11, 12 (9th Cir. 1977), *cert. denied*, 435 U.S. 1000, 98 S.Ct. 1656, 56 L.Ed.2d 90 (1978).

Petitioner's attempt to avoid the rule in *Stone v. Powell* must fail, for this aspect of her claim has already been litigated. A review of the trial transcript persuades the Court that defendant not only had a fair opportunity to establish, but that she actually attempted to esablish, at the suppression hearing on February 20, 1976, that the purpose of the surveillance was to gather evidence to be used against her.[17] In addition, the Court of Appeals explicitly noted in its opinion that "the government adequately established that its practice of monitoring • • • prisoner-visitor conversations was a reasonable means of maintaining prison security." *United States v. Hearst, supra,* 563 F.2d at 1346. Finally, despite the court's characterization of defendant's position on appeal, a reading of the briefs compels the conclusion that the argument was indeed put forward.[18] Under these circumstances, no reliti-

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[17]During the hearing defense counsel Albert Johnson examined San Mateo County Sheriff, John McDonald, as to the purposes for which the surveillance was conducted. After eliciting from McDonald his knowledge that tapes were being forwarded to the United States Attorney's office, Johnson asked:

"Well, this necessarily would be contrary to your primary purpose in recording the tapes initially, that is, for jail security purposes; is that not so, Sheriff?" R.T. 1709.

[18]Defendant's appellate brief, at 54-55, states the following:

"It is respectfully submitted that the intrusions on Patricia Hearst's privacy at San Mateo County jail were not justified by any real or imaginary interests in prison security. Indeed, the trial court, because of its particular view of the controlling law in this area, made no finding with respect to whether legitimate security interests were present. Testimony at trial reflected only a vague concern for the publicity attendant to defendant's case. (T. 1698, 1702). On the other hand, jail officials did act in a manner inconsistent with any real security problems. While these officials claimed a compelling need to

gation of the Fourth Amendment claim, which has twice been heard and rejected by lower federal courts, and considered an insufficient ground for grant of *certiorari* by the Supreme Court, is appropriate here.

To the extent that petitioner's challenge to the use of the tape is grounded in the Sixth Amendment, she proffers no evidence whatsoever which could support a successful claim

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monitor her visiting room conversations, they did not permanently detain her in a maximum security area (T. 1694), nor did they monitor or record her conversations outside the visiting area, despite the fact that the entire jail was equipped for such action. (T. 1699-1700). In fact, the monitoring that was done was performed so carelessly that for periods of time only a dead line was recorded. (T. 1696).

Even assuming that a legitimate threat to jail security existed, it is appellant's contention that the primary purpose for monitoring and recording her visiting room conversations was not the security considerations. Lieutenant Goed admitted to several purposes behind this action (T. 1711-12), and Sheriff McDonald testified that

[W]e were keeping rather detailed information about Patricia Hearst while she was in our custody for anyone's information, *trial purposes* or anything that comes up in the future about her while she was in our custody. * * * We were keeping all information as a matter of record.

(T. 1703) (emphasis added). Finally, the delivery of the tapes to the F.B.I. upon a determination by jail officials that there was no information on the tapes vital to jail house security, undermines any contention that the monitoring and recording of the conversations with friends and family was ever motivated by security interests. At the very least, jail security is certainly not a plausible reason for turning the tapes over to the prosecution *after* it was determined that they contained no information of relevance to jail security." (Footnote omitted.)

These passages present, in nearly identical form, the arguments petitioner seeks now to press upon this Court.

for relief. The Supreme Court has recently made clear that the Sixth Amendment rights defined in *Massiah v. United States, supra,* do not attach in the absence of an interrogation—either formal or surreptitious—by the government itself. *Brewer v. Williams, supra,* 430 U.S. at 400-401, 97 S.Ct. 1232; *United States v. Hearst, supra,* 563 F.2d at 1348. Ms. Hearst makes no claim that her interview with Tobin was anything more than what it purported to be—a visit with a childhood friend. Therefore, her objection to the use of the Tobin tape at trial cannot form the basis for relief under any construction of the facts set forth in her petition.

IV.

The final matter for determination is petitioner's claim that chief trial counsel, Mr. F. Lee Bailey, failed to provide effective assistance of counsel, in that (a) his alleged plans to write a book about the trial created a conflict of interest, which caused him to make tactical decisions prejudicial to the defendant; (b) counsel's pursuit of other business activities jeopardized his ability to perform properly his functions at trial; (c) he failed to investigate and prepare adequately a motion to suppress the "Tobin tape"; (d) he neglected to investigate and develop additional defenses on Ms. Hearst's behalf; (e) counsel failed to inform himself as to the facts and the law regarding the privilege against self-incrimination; (f) counsel failed to investigate the effects of pretrial publicity; and (g) he failed to communicate with defendant during the course of his representation.

A.

Preliminarily, it should be noted that the standard by which the Court must measure defendant's claims of ineffective assistance of counsel is presently a matter of continuing "evolution" in this circuit. *See Cooper v. Fitzharris,* 551 F.2d 1162 (9th Cir. 1977), *rehearing en banc granted,* No. 74-2998 (June 28, 1977); *Maryland v. Marzallo,* 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978) (White, J., dissenting from denial of a petition for a writ of *certiorari*). The Court of Appeals has applied various tests, ranging from the traditional inquiry into whether or not the trial constituted a "farce, sham, or mockery of justice," *United States v. Stern,* 519 F.2d 521, 524 (9th Cir. 1975), *cert. denied,* 423 U.S. 1033, 96 S.Ct. 565, 46 L.Ed.2d 407 (1975), to a more stringent examination of whether reasonably effective assistance was actually rendered. *Cooper v. Fitzharris, supra,* 551 F.2d at 1166. This latter, most demanding standard has been summarized as follows:

> "[T]he role of the District Court presented under allegations of ineffective assistance of counsel is not to pass upon the merits of the action not taken but to determine whether, under the particular facts and circumstances of the case, trial counsel failed to render reasonably effective assistance." *Id.* at 1166.[19]

Each of the several standards employed requires a thorough review of all the facts and circumstances of the case. In the instant case, such a review, even when con-

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[19]Although the decision in *Cooper v. Fitzharris,* 551 F.2d 1162 (9th Cir. 1977), has been vacated, and a rehearing *en banc* granted, No. 74-2998 (June 28, 1977), application of this most severe standard will serve to insure the fullest possible consideration of petitioner's contentions.

ducted under the exacting standard of *Cooper v. Fitzharris*, demonstrates the frivolous nature of defendant's allegations as to the adequacy of her counsel. The exhaustive efforts expended on her behalf in the course of the proceedings serve to expose petitioner's specific complaints as speculative, unfounded assertions completely unwarranted by the record.

When defendant was first taken into custody on September 18, 1975, she employed Mr. Terence Hallinan as counsel. Mr. Hallinan handled the early proceedings in the case, including defendant's arraignment and several bail reduction hearings. Shortly thereafter, on October 2, defendant substituted as counsel Mr. F. Lee Bailey and his associates, Mr. J. Albert Johnson and Mr. Thomas J. May. Mr. Bailey is a trial lawyer of considerable experience, well-known not only in his home state of Massachusetts, but in many other American jurisdictions as well. He has appeared before the Supreme Court of the United States and has authored a number of books on the subject of criminal defense.[20] In all, the defense team consisted of five attorneys and a full time investigator.[21]

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[20]*See, e.g.*, Bailey and Greenya, For The Defense (1975); Aronson and Bailey, The Defense Never Rests (1971); Bailey and Rothblatt, Investigation and Preparation of Criminal Cases, Federal and State (1970); Complete Manual of Criminal Forms, Federal and State (1968).

[21]In addition to Bailey, Johnson, and May, the defense team included Mr. Henry Gonzales and Mr. E. John Kleines, an attorney associated with the Hearst family. Mr. John McNally, a private investigator from New York City, was also retained to assist in the preparation of the defense.

A reexamination of proceedings held prior to trial discloses a record of vigorous and thorough preparation by the defense. More than twenty major motions were presented for consideration by the trial court. The pursuit of discovery was aggressive, and included motions for complete access to all government files, for the names and addresses of all government witnesses, for the identities of all experts known to the government who could testify as to the collateral effects of kidnapping, for production of all defendant's statements in the hands of the government, for production of the grand jury transcripts, for production of all materials obtained through electronic surveillance, and finally, for the production of all *Brady* materials. *United States v. Hearst,* 412 F.Supp. 863 (N.D.Cal.1975). The fruits of these discovery efforts were voluminous—this Court has previously characterized the production resulting from the *Brady* request alone as "massive materials, including reports, records, documents, and all of defendant's known statements in the government's possession."[22] *United States v. Hearst,* 424 F.Supp. 307, 310 (N.D.Cal.1976).

As well, the record discloses that the defense challenged, prior to trial, the admissibility of major pieces of evidence in the government's case, including evidence of crimes committed subsequent to the armed robbery at the Hibernia Bank, defendant's incriminating statements made on tape and to various prosecution witnesses, the Tobin tape, and evidence discovered in a search pursuant to the arrest of

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[22]The FBI reports furnished to defendant under discovery requests totalled 3,300 pages; a complete set of documents seized at the time of arrest numbered an additional 1,200 pages. *United States v. Hearst,* 424 F.Supp. 307, 310 (N.D.Cal. 1976).

William and Emily Harris. *See United States v. Hearst,* 412 F.Supp. 880 (N.D.Cal.1976); *United States v. Hearst,* 412 F.Supp. 888 (N.D.Cal.1976); *United States v. Hearst,* 412 F.Supp. 891 (N.D.Cal.1976). In conjunction with these efforts, the defense sought to limit the government's cross-examination of Ms. Hearst to events immediately surrounding the bank robbery itself. *United States v. Hearst,* 412 F.Supp. 885 (N.D.Cal.1976).

Ms. Hearst's defense was conducted no less vigorously at trial. The extensive *voir dire,* which proceeded *in camera* at the request of defense counsel, has been described above in detail. During the trial itself, despite defense efforts to remove key elements from the government's case, and to discredit its witnesses,[23] the material presented by the prosecution was formidable indeed. This Court has previously described the evidence of defendant's voluntariness as "massive," for it included:

> "the verve and alacrity of defendant's movements during the bank robbery (vividly captured on film); the apparent sincerity of her revolutionary taped messages * * *; defendant's matter-of-fact statements to witness Matthews that her role in the robbery had been voluntary * * *; indications on cross-examination of defendant that she enjoyed relative freedom during her alleged 'captivity'; SLA documents chronicling revolutionary escapades, a major portion of which defendant admitted having written; the admit-

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[23]Defense efforts to impeach government witnesses were extensive. Mr. Bailey's cross-examination of Dr. Joel Fort alone extended over a three-day period. In addition, rebuttal witnesses were presented by the defense in an attempt to impeach the testimony of the government's chief psychiatric experts, Dr. Fort and Dr. Kozol.

> ted clenched fist salutes given by defendant after her arrest; defendant's utterance of revolutionary slogans to her friend Trish Tobin in jail; * * *." *United States v. Hearst*, 424 F.Supp. 307, 317 (N.D.Cal.1976).

Faced with a virtual avalanche of evidence, the defense case was impressively conducted. Over the course of twelve days, covering some sixteen hundred pages of transcript, fourteen defense witnesses, including four experts, were presented to the jury. The theory of the defense, and defendant Hearst's extensive testimony in support thereof, have been previously set forth. At the conclusion of the trial, Judge Carter acknowledged the considerable efforts by counsel for both sides.[24]

With the acuity of vision that regularly comes with hindsight, petitioner now claims that trial counsel failed to provide effective assistance in her defense. The Court will consider each of her specific complaints.

B.

Petitioner first contends that conflicts of interest which allegedly beset trial counsel rendered his representation ineffective. She advances three allegations: (1) that coun-

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[24]Judge Carter made the following remarks:

> "As to the lawyers * * * in this case: I always start the case with a prayer that good lawyers be sent to the courtroom, and may I say to you that I have had the representation of skilled counsel from both sides who have done their literal best to present this evidence as they saw it.
>
> It has not been an easy proposition. I understand the trial problem, because I was a trial lawyer for a considerable period of time and lived in a trial lawyer's family. You gentlemen performed with honor and in accordance with the high calling which you have accepted as your station in life." R.T. 4582.

sel's contract to write a book about her trial created an inherent conflict between the goals of counsel and the interests of petitioner; (2) that counsel's position as a well-known author and speaker required that he surround the trial with as much publicity as possible, contrary to defendant's best interests, and (3) that various of counsel's business commitments rendered him too weary to conduct an adequate defense.

The Sixth Amendment requires that the services of an attorney be devoted solely to the interests of his or her client. *Glasser v. United States,* 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942). The pressure of conflicting loyalties, particularly those which involve financial interests outside the representation itself, may render suspect the adequacy of the lawyer's performance. *United States v. Hurt,* 177 U.S.App.D.C. 15, 19, 543 F.2d 162, 166 (1976); ABA Code of Professional Responsibility, Canon 5. In keeping with this concern, the acquisition by defense counsel, prior to the conclusion of the representation, of literary or dramatic rights to the client's "story," is a practice which deserves judicial condemnation. *Wojtowicz v. United States,* 550 F.2d 786, 793 (2d Cir. 1977); *People v. Corona,* 80 Cal. App.3d 684, 720, 145 Cal.Rptr. 894, 915 (1978). The ABA Code of Professional Responsibility renders such conduct, where proven, the object of disciplinary proceedings. *Id.,* DR 5-104(B). This is properly so, for counsel's obligation to provide an effective defense to the accused is too important to suffer the possibility that divergent financial interests will diminish the rigor of the representation.

Distasteful as the practice may be, however, it is not the case that the mere existence of a publication rights

contract renders the representation constitutionally deficient. In this circuit, the well-established rule is that to prevail on a claim of conflict of interest, defendant must demonstrate that *actual prejudice* resulted from the alleged conflict. *United States v. Kutas*, 542 F.2d 527, 529 (9th Cir. 1976), *cert. denied*, 429 U.S. 1073, 97 S.Ct. 810, 50 L.Ed.2d 790 (1977); *United States v. Eaglin*, 571 F. 2d 1069, 1086 (9th Cir. 1977). And although such claims have arisen most frequently in connection with dual representation of co-defendants, the same rule has been applied in circumstances involving publication rights arrangements. *Wojtowicz v. United States, supra; Ray v. Rose*, 535 F.2d 966, 974 (6th Cir. 1976), *cert. denied*, 429 U.S. 1026, 97 S.Ct. 648, 50 L.Ed.2d 629 (1976); *People v. Corona, supra.*

Under this standard, none of the petitioner's allegations as to Mr. Bailey's alleged conflicts are sufficient to state a claim for relief. With respect to the book contract, defendant has not even made a colorable claim of actual prejudice to her defense. Her principal contention appears to be that, in order to remove vast areas of her story from the attorney-client privilege, and to heighten public attention to her trial, defense counsel demanded that she take the stand to testify, even though he realized that her repeated invocations of the Fifth Amendment would ultimately doom her cause. The record does not support this fanciful version of the facts, for, as the Court of Appeals has previously observed, the overwhelming evidence of guilt presented by the government rendered defendant's testimony a reasonable, if not obligatory, tactical choice:

> "The government presented a strong case against appellant. It introduced undisputed evidence that she

> had participated in the bank robbery. Since bank robbery is a crime requiring only a general intent, the jury could have inferred the requisite intent from the very commission of the act. [citations omitted] Appellant's only hope was to testify about her role in the robbery. She could not have relied solely on the testimony of her expert witnesses, for the government presented an impressive array of psychiatric testimony disputing appellant's claim that she had participated involuntarily in the robbery. We believe that appellant would have testified even if the trial court had ruled at the beginning of the trial that her privilege against self-incrimination was subject to waiver." *United States v. Hearst, supra,* 563 F.2d at 1343-1344.

In addition, defendant's application discloses that both she and her family were fully aware, prior to trial, that Bailey was contemplating a publication rights contract. Although such knowledge may fall short of a waiver of any objection to the arrangement, it is a factor which casts a pallor of insincerity over defendant's belated contentions.

Substantially the same can be said of petitioner's other allegations of conflict. If Bailey's busy schedule left him too fatigued to attend the trial, the record does not disclose it. His participation appears to have been alert and attentive at all times. And even had counsel over-extended himself, qualified co-counsel were in attendance throughout the trial.[25] As well, defendant provides no specifics as to the

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[25]Petitioner argues, in her reply memorandum, that Bailey delegated excessive responsibility for her defense to other members of the defense team. However, such an allegation is irrelevant, for petitioner has not even suggested that these attorneys were other than qualified, competent counsel.

means by which Bailey attempted to generate publicity for the trial (other than his decisions to put defendant on the stand, and to waive objections to venue, tactical choices which are discussed elsewhere in this Opinion). Indeed, the Court is quite certain that the tremendous public attention given the trial would have existed even in Bailey's absence.

The authorities relied upon by defendant are such a far cry from this case as barely to merit discussion. In *People v. Corona, supra,* in which a California appellate court found a publication rights contract to be improper, the facts supporting the existence of actual prejudice were overwhelming. Defense counsel failed to explore clearly relevant and substantial defenses, resisted the trial court's attempts to secure psychiatric examinations which were obviously appropriate, committed gross errors of law, and participated openly in attempts to generate publicity for the trial. The court summed up counsel's performance as follows:

> "Despite the aforestated wide ranging and elaborately woven web of circumstantial evidence connecting appellant to the crimes and unerringly pointing to his participation in their commission, trial counsel for appellant failed to raise the obvious alternative defenses of mental incompetence * * * and/or diminished capacity and/or legal insanity * * *. Still worse, trial counsel failed to present any meaningful defense at all. After a lengthy trial, lasting several months, in which the prosecution produced more than 100 lay and expert witnesses and put in an immense wealth of documentary evidence, defense counsel failed to call a single witness on his client's behalf, and submitted the case basically upon the evidence produced by the prosecu-

> tion. After a relatively short deliberation, lasting approximately five days, the jury brought in its verdicts finding appellant guilty of first degree murder on all 25 counts charged." *Id.*, 80 Cal.App.3d at 702, 145 Cal. Rptr. at 903 (citations and footnotes omitted).

This shocking dereliction of duty stands in sharp contrast to the exhaustive efforts, recounted above, made on behalf of Ms. Hearst. In like manner, the other cases relied upon by the petitioner involved far more obvious conflicts of interest which resulted in acute, demonstrable prejudice. *See MacKenna v. Ellis,* 280 F.2d 592 (5th Cir. 1960) (inexperienced defense counsel who had application for employment pending with the district attorney, accommodated state's request for an expedited trial, and, as a result, presented only a "half-hearted defense"; *Wilson v. Phend,* 417 F.2d 1197 (7th Cir. 1969) (defense counsel, who owned local newspaper which carried extensive accounts of trial, changed defendant's plea to one of insanity without consultation with defendant, failed to present alibi witnesses on defendant's behalf, and failed to move for new trial); *United States v. Hurt, supra* (appellate counsel, having been sued by defendant's former trial counsel for pressing inadequacy of counsel claims on appeal, sought several times to be excused from case, and proceeded to represent defendant only under threat of contempt). These authorities provide no support whatsoever to petitioner's contentions. Having failed to assert any facts which could demonstrate actual prejudice to her case, petitioner can obtain no relief from the conflicts of interest she has alleged.

C.

The majority of petitioner's remaining claims express a common theme: that defense counsel failed to investigate properly the facts and/or law relative to various defenses and strategies, and, as a result, made decisions uneducated by relevant factual and legal considerations. To such deficiencies, defendant attributes: (1) counsel's alleged failure to present meritorious arguments in support of defendant's motion to suppress the Tobin tape; (2) the decision to place defendant upon the stand to testify; (3) counsel's failure to raise "involuntary drug ingestion" as a defense to the charges; and (4) the failure to move for a change of venue to counter the adverse effects of pretrial publicity.

The Sixth Amendment requires that counsel not only provide effective representation at trial, but also that appropriate investigation, both factual and legal, be made to insure that all available defenses will be explored and considered. *Brubaker v. Dickson,* 310 F.2d 30, 38 (9th Cir. 1962); *United States v. DeCoster,* 159 U.S.App.D.C. 326, 333, 487 F.2d 1197, 1204 (1973). Important decisions to withdraw crucial defenses, or to waive the assertion of clear legal rights, will render representation inadequate if made without the benefit of necessary factual and legal research. *People v. Corona, supra,* 80 Cal.App.3d at 705, 145 Cal.Rptr. at 905.

However, counsel are not required to exhaust every possible lead, no matter how speculative or insubstantial. In *Cooper v. Fitzharris, supra,* the Ninth Circuit made clear

that even the strictest standard by which counsel's conduct is to be measured

> "does not mean that [the court] should second guess reasoned choices between trial tactics nor does it mean that defense counsel, to protect himself against allegations of inadequacy, must make every conceivable motion no matter how remote the possibilities are of success. It is sufficient if he is prepared and conducts the defense with reasonable knowledge and skill with an exercise of knowledgeable choices of trial tactics." *Id.* at 1166.

In addition, it has long been understood that "[where] counsel otherwise perform in a fully competent manner, a choice of trial tactics * * * can rarely be said to rise to the level of a deprivation of a constitutional right." *Mengarelli v. United States,* 476 F.2d 617, 619 (9th Cir. 1973).

Those cases relied upon by petitioner which find representation inadequate on grounds of insufficient research or investigation share two common features. First, the existence of relevant facts which counsel failed to develop was obvious, and the facts themselves unquestionably relevant to the defense. In *Brubaker v. Dickson, supra,* for example, defendant was charged with first degree murder. His appointed counsel, after having spent a total of one hour with defendant in pretrial preparation, failed to raise any defenses going to defendant's mental competency. The Court of Appeals summarized the information available to counsel suggesting the existence of such a defense:

> "Electroencephalographic (EEG) examinations made subsequent to appellant's conviction revealed organic brain damage. His prior medical history con-

> tained episodes of head injury and infantile illness from which the brain damage could have resulted; there were no such incidents subsequent to the homicides. Medical opinion indicated that the damage was such as to render appellant 'definitely seizure prone'; and was 'of a type often associated with abnormal and otherwise unexplainable conduct.' There was psychiatric opinion based upon post-conviction evaluations that appellant, while not 'insane,' had a compulsive personality marked by strong emotional instability. There was substantial evidence of hypersensitivity to alcohol; and the record established that immediately prior to the homicides appellant had drunk heavily. There was competent medical opinion to support the view that, in the light of these and other factors, appellant was incapable of entertaining the specific intent required for first-degree murder at the time and in the circumstances of the homicides." *Id.* at 33 (footnotes omitted).

Similarly, the court in *People v. Corona, supra,* 80 Cal. App.3d at 706-709, 145 Cal.Rptr. at 906-908, noted the existence of overwhelming facts, completely ignored by counsel, which pointed to the clear availability of defenses based upon the mental condition of the defendant.

Second, in none of the cases relied upon by defendant did the failure to investigate extend merely to a single element in an otherwise well-litigated matter; rather, the constitutional defect was the failure to investigate *any* facts, resulting in the inability to present any defense whatsoever on behalf of the accused. *See Brubaker v. Dickson, supra, United States v. DeCoster, supra.* Illustrative is *Wilson v. Rose,* 366 F.2d 611 (9th Cir. 1966), in which the court found

that counsel's failure to inform himself as to the facts and law of the case resulted in a denial of defendant's Sixth Amendment rights. Counsel's performance was summarized as follows:

> "Throughout all this period * * * counsel for the accused failed in any real sense to advise and consult with the accused; failed to discuss possible defenses or the facts of the case with the accused; failed to pursue any discovery devices available; failed to investigate the case or interview witnesses; and failed to advise the accused of the nature and consequences of a guilty plea. Counsel not only failed to advise the accused that a guilty plea might result in a prison sentence, but unequivocally assured the accused that he would be granted probation." *Id.* at 613-614 (footnote omitted).

Therefore, petitioner cannot prevail upon a showing of merely eroneous tactical or strategic decisions, but must demonstrate a failure by counsel to inquire into matters plainly relevant and substantial to her defense. Based upon these principles, none of petitioner's several allegations are sufficient to constitute a basis for relief.

Petitioner's attack on defense counsel's treatment of the motion to dismiss the Tobin tape concentrates upon two areas: (1) an allegedly incomplete and poorly-researched memorandum filed in support of the motion; and (2) a chronicle of "evidence," not introduced at trial, which petitioner claims would show that the taping was conducted for

unconstitutional purposes.[26] Little more need be said on this topic, for the extensive proceedings relative to the tape are detailed above. *See* III, *supra.* The record itself discloses substantial efforts to pursue this matter, including the taking of testimony at an evidentiary hearing, argument to the trial court, and briefing and reargument in the Court of Appeals. Moreover, nothing can turn on the form of a single memorandum submitted in the course of this lengthy proceeding—it should be obvious that given the pressing demands upon counsel during the pretrial period, and the tremendous discovery material requiring examination (*See* IV, A, n.22, *supra*), not every document submitted can be an exhaustive summary of the law. What is important is that the issues be investigated and presented to the trial court in a competent manner—this much was certainly accomplished here.

Petitioner also challenges counsel's decision to have her testify, claiming: (1) that the decision was based upon clearly erroneous assumptions about the law governing the scope of the government's cross-examination of her testimony; and (2) that her testimony was superfluous to her defense and should therefore not have been presented. However, because the Court concurs in the express ruling of the Court of Appeals that this decision constituted a deliberate, tactical choice by counsel, it cannot provide a basis

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[26]To the extent that such "evidence" is based upon information disclosed in *In re Delancie v. McDonald*, Superior Court of San Mateo County, Doc. No. 207385, a state court action commenced nearly two years after the conclusion of petitioner's trial, the Court is unable to understand how defense counsel could possibly have had access to such material.

for review here. *Cooper v. Fitzharris, supra.* Furthermore, as previously noted, the compelling evidence educed by the prosecution rendered defendant's presence on the witness stand a necessary—if not essential—element of her defense. *See United States v. Hearst, supra,* 563 F.2d at 1343-1344.

Petitioner next charges that defense counsel failed to investigate facts which, if properly developed, would have provided her with a further defense to the robbery; to wit, that she had unknowingly ingested mind-altering drugs during her captivity. In an affidavit submitted as part of this application, Mr. Vincent Hallinan alleges, in substance, that shortly after the petitioner's arrest, he spoke with an inmate of the California Medical Facility at Vacaville, who purported to have spoken at some earlier time with Donald DeFreeze (one of Ms. Hearst's kidnappers). DeFreeze, who was dead by the time of petitioner's arrest, is alleged to have told Jefferson that he was familiar with indoctrination programs utilizing both stress treatment and drugs, and that he intended to carry out such a program on the child of a wealthy American family. Petitioner claims that such facts merited further investigation which was not performed, thereby resulting in a forfeiture of the defense.

Such allegations, even if proven, do not entitle petitioner to relief. The Court regards the existence of this "defense," at least as set forth in the Hallinan affidavit, as extremely speculative at best. Hallinan states that he spoke with a prison inmate, who had allegedly spoken to another inmate, since deceased, who told him, not of facts then in existence, but only contemplated for the future. This is hardly the kind of obvious factual material which the Sixth Amendment compels counsel to pursue. Second, the bail affidavit

executed by petitioner on September 22, 1975, in which she hinted at the use of drugs, was later thoroughly discredited by her testimony at trial. R.T. 1496-1506. Most importantly, none of the many reports prepared by various psychiatric experts who examined defendant prior to trial—clearly the most probative evidence to which counsel could look to ascertain the potential for a drug-related defense—suggest even the likelihood that drug ingestion may have explained petitioner's behavior.[27] Under these circumstances, nothing presented by petitioner could support a finding that counsel was derelict in this regard, even were it established that no investigation was conducted into this area.

Counsel is further criticized for having failed to undertake inquiries into the prejudicial nature of pretrial publicity, and for neglecting to present facts bearing thereon to the trial court. This claim, too, is without merit. First, as discussed above (*See* II, *supra*), counsel's decision to try the case in San Francisco was clearly a tactical choice, and therefore unreviewable here. Second, the extensive and thorough *voir dire* conducted at the insistence of counsel was more than sufficient to assure that petitioner's right to

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[27]The Court reviewed in detail each of the many medical and psychiatric reports held here under seal, including reports by Dr. Seymour Pollack, Dr. Louis Jolyon West, Dr. Margaret Singer, Dr. Donald T. Lunde, Dr. Barry R. Tharp, and Dr. William C. Fowkes, Jr. The reports are unanimous in stating that defendant did not recall the use of drugs during the two-year period prior to her arrest. Nor do any of the psychiatrists describe any symptoms which, in their view, are attributable to drug ingestion. Indeed, the report of Dr. Pollack asserts unequivocally that "there is no mental impairment due to brain damage, drugs, metabolic or physical disease."

an impartial jury was preserved. In addition, it is unclear what petitioner would have had counsel "investigate"—the nature and extent of publicity were fairly obvious, and judgments as to popular sentiment are inherently speculative and inexact. The Constitution certainly does not require that professional surveys be ordered to determine whether the public climate in another jurisdiction is markerly better than that where the indictment was filed.

For these reasons, the Court finds petitioners' allegations of inadequate trial preparation on the part of her counsel clearly insufficient to entitle her to relief.

D.

Petitioner's final contention is that because she was not privy to certain aspects of the trial and pretrial decision-making process, she has been denied effective assistance of counsel. In particular, she avers that the decision to try her case in San Francisco, despite extensive pretrial publicity, as well as the election to present her testimony, were made without her participation or consent.

However, petitioner is not entitled to attack such decisions here, for as noted above, the record reveals them to be the considered, tactical choices of defense counsel. It has been clear since *Henry v. Mississippi, supra,* that absent a showing of exceptional circumstances, the strategic decisions of competent trial counsel are binding, even when made without the express consent of the defendant. *Id.,* 379 U.S. at 451-452, 85 S.Ct. 564; *Estelle v. Williams,* 425 U.S. 501, 508 n. 3, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976); *Wainwright v. Sykes, supra,* 433 U.S. at 91 n. 14, 97 S.Ct. 2497. The record does not support a finding of "exceptional circumstances" with respect to petitioner's representation at

trial, nor have any been urged upon the Court. Moreover, Ms. Hearst's obviously well-prepared testimony at trial renders it exceedingly unlikely that the decision to have her testify was thrust upon her in the eleventh hour. Finally, in light of counsel's unchallenged statement that more than one thousand hours were spent in consultation with the petitioner, it strains credibility to suggest that she was unaware of significant aspects of the defense strategy.

Under these circumstances, no evidentiary hearing is necessary to determine that petitioner's allegations of insufficient consultation by counsel can provide no basis whatsoever for relief.

V.

None of petitioner's many claims are sufficient to require an evidentiary hearing to determine whether her sentence should be vacated or modified. Examined in detail, the contentions advanced in her lengthy petition are plainly without merit. Based upon its searching review of the entire record, the Court can only conclude that Ms. Hearst was afforded a trial which was both full and fair, conducted on her behalf by counsel whose assistance was adequate by all constitutional standards. Further, this Court is not persuaded that justice requires a reduction of her sentence. Accordingly, petitioner's motions, pursuant to 28 U.S.C. § 2255 and Rule 35 of the Federal Rules of Criminal Procedure, are DENIED.

Appendix C

CANON 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.[1] A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client.[2] A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

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EC-4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the

presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

EC 4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information.

DISCIPLINARY RULES

DR 4-101 Preservation of Confidences and Secrets of a Client.[10]

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) Except when permitted under DR 4-101 (C), a lawyear shall not knowingly:

(1) Reveal a confidence or secret of his client.[11]

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself[12] or of a third person,[13] unless the client consents after full disclosure.

CANON 5

A Lawyer Should Exercise Independent Professional Judgment on Behalf of a Client

ETHICAL CONSIDERATIONS

EC 5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties.[1] Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client.

Interests of a Lawyer That May Affect His Judgment

EC 5-2 A lawyer should not accept proffered employment if his personal interests or desires will, or there is a reasonable probability that they will, affect adversely the advice to be given or services to be rendered the prospective client.[2] After accepting employment, a lawyer carefully should refrain from acquiring a property right or assuming a position that would tend to make his judgment less protective of the interests of his client.

EC 5-4 If, in the course of his representation of a client, a lawyer is permitted to receive from his client a beneficial ownership in publication rights relating to the subject matter of employment, he may be tempted to subordinate the interests of his client to his own anticipated pecuniary gain. For example, a lawyer in a criminal case who obtains from his client television, radio, motion picture, newspaper, magazine, book, or other publication rights with respect to the case may be influenced, consciously or unconsciously, to a course of conduct that will enhance the value of his publication rights to the prejudice

of his client. To prevent these potentially differing interests, such arrangements should be scrupulously avoided prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.

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Desires of Third Persons

EC 5-21 The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment.[25] The desires of a third person will seldom adversely affect a lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer. These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client;[26] and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client.

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DR 5-101 Refusing Employment When the Interests of the Lawyer May Impair His Independent Professional Judgment.

(A) Except with the consent of his client after full disclosure, a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client will be or reasonably may be affected by his own financial, business, property, or personal interests.[29]

CANON 9

A Lawyer Should Avoid Even the Appearance of Professional Impropriety

ETHICAL CONSIDERATIONS

EC 9-1 Continuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system.[1] A lawyer should promote public confidence in our system and in the legal profession.[2]

EC 9-2 Public confidence in law and lawyers may be eroded by irresponsible or improper conduct of a lawyer. On occasion, ethical conduct of a lawyer may appear to laymen to be unethical. In order to avoid misunderstandings and hence to maintain confidence, a lawyer should fully and promptly inform his client of material developments in the matters being handled for the client. While a lawyer should guard against otherwise proper conduct that has a tendency to diminish public confidence in the legal system or in the legal profession, his duty to clients or to the public should never be subordinate merely because the full discharge of his obligation may be misunderstood or may tend to subject him or the legal profession to criticism. When explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession.[3]

Appendix D

No. 78-3612

IN THE

United States Court of Appeals

FOR THE NINTH COURT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

PATRICIA CAMPBELL HEARST,
Defendant-Appellant.

On Appeal from a Judgment of the United States District Court for the Northern District of California Denying Appellant's Motion Pursuant to 28 U.S.C. § 2255

BRIEF OF APPELLANT

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B. Upon Establishing Conduct Prohibited by the Canons of Professional Responsibility Which Is "Deserving of Judicial Condemnation", [Opinion, p. 21, C.T. 551], and a "Distasteful" Practice Because There Is an Inherent Possibility that "Divergent

Financial Interests will Diminish the Rigor of the Representation", [Opinion, p. 21, C.T. 551] Prejudice to the Defendant is Established, and her Conviction Must Be Set Aside.

1. **The District Court's Determination Without an Evidentiary Hearing that Defendant Suffered No Prejudice Amounts to "Unguided Speculation". Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173 at 1182. Prejudice Per Se Is Apparent From the Record Assuming Defendant Had Been Allowed the Rule 6 Discovery as Prayed.**

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